such as has never heretofore been asserted and such as this court, whenever the question has been submitted to it, has avoided saying exists.

The carrier is compelled to determine, whether or not this Act, so destructive of its rights, is legal or illegal, under penalty of what will amount almost to confiscation, if it shall err in its determination.

Surely, there should be some provision, which would reserve to the carrier, before being subjected to such gigantic mulcts, some opportunity to obtain a judicial determination of its rights.

To say that it has its "day in court," when each day in court will expose it to a possible loss of $6,000,000, is to substitute a sarcasm for a legal privilege.

The principle involved is not dissimilar from that which was settled in *ex parte* Young, 209 U. S., 147, where it was thus held:—

> "If the law be such as to make the decision "of the legislature or of a commission conclusive as "to the sufficiency of the rates, this court has held "such a law to be unconstitutional. Chicago, &c., "Railway Co. *vs.* Minnesota, 134 U. S., 418. A law "which indirectly accomplishes a like result by im- "posing such conditions upon the right to appeal for "judicial relief as works an abandonment of the right "rather than face the conditions upon which it is "offered or may be obtained, is also unconstitu- "tional. It may therefore be said that when the "penalties for disobedience are by fines so enor- "mous and imprisonment so severe as to intimidate "the company and its officers from resorting to the "courts to test the validity of the legislation, the re- "sult is the same as if the law in terms prohibited the "company from seeking judicial construction of laws "which deeply affect its rights.
>
> "It is urged that there is no principle upon which "to base the claim that a person is entitled to dis- "obey a statute at least once, for the purpose of "testing its validity without subjecting himself to "the penalties for disobedience provided by the "statute in case it is valid. This is not an accurate

"statement of the case. Ordinarily a law creating "offenses in the nature of misdemeanors or felonies "relates to a subject over which the jurisdiction of "the legislature is complete in any event. In the "case, however, of the establishment of certain rates "without any hearing, the validity of such rates nec- "essarily depends upon whether they are high "enough to permit at least some return upon the "investment (how much it is not now necessary to "state), and an inquiry as to that fact is a proper "subject of judicial investigation. If it turns out "that the rates are too low for that purpose, then "they are illegal. Now, to impose upon a party in- "terested the burden of obtaining a judicial decision "of such a question (no prior hearing having ever "been given) only upon the condition that if unsuc- "cessful he must suffer imprisonment and pay fines "as provided in these acts, is, in effect, to close up "all approaches to the courts, and thus prevent any "hearing upon the question whether the rates as "provided by the acts are not too low and therefore "invalid. The distinction is obvious between a case "where the validity of the act depends upon the ex- "istence of a fact which can be determined only after "investigation of a very complicated and technical "character, and the ordinary case of a statute upon "a subject requiring no such investigation and over "which the jurisdiction of the legislature is complete "in any event.

"We hold, therefore, that the provisions of the "acts relating to the enforcement of the rates, either "for freight or passengers, by imposing such enor- "mous fines and possible imprisonment as a result "of an unsuccessful effort to test the validity of the "laws themselves, are unconstitutional on their face, "without regard to the question of the insufficiency "of those rates."

Mr. Justice Field in his concurrent opinion in Pollock *vs.* Farmers' Loan & Trust Co., 157 U. S., 595, said:—

"A law containing arbitrary exemptions can in "no just sense be termed uniform. In my judgment,

"Congress has rightfully no power, at the expense "of others, owning property of a like character, to "sustain private trading corporations, such as build- "ing and loan associations, savings banks, and mu- "tual life, fire, marine, and accident insurance com- "panies, formed under the laws of the various States, "which advance no national purpose or public in- "terest and exist solely for the pecuniary profit of "their members. * * * Wherever a distinction "is made in the burdens a law imposes or in the "benefits it confers on any citizens by reason of their "birth, or wealth, or religion, it is class legislation, "and leads inevitably to oppression and abuses, and "to general unrest and disturbance in society."

The Young case made effective what had been previously foreshadowed by Mr. Justice Brewer, in Chicago Railway Co. *vs.* Minnesota, 134 U. S., 418, 456:—

"This being the construction of the statute by "which we are bound in considering the present "case, we are of opinion that, so construed, it con- "flicts with the Constitution of the United States "in the particulars complained of by the railroad "company. It deprives the company of its right to "a judicial investigation, by due process of law, "under the forms and with the machinery provided "by the wisdom of successive ages for the investi- "gation judicially of the truth of a matter in con- "troversy, and substitutes therefor, as an absolute "finality, the action of a railroad commission, which, "in view of the powers conceded to it by the State "court, cannot be regarded as clothed with judicial "functions or possessing the machinery of a court "of justice."

III. The Commodities Clause is unconstitutional because, making illegal discriminations, it is not "due process of law."

Under this head, it is hardly necessary to say, that if the Act is improperly discriminating in any vital part, it is invalid as to the whole. If the discrimination in favor

of railroad companies carrying timber or its manufactured products is bad, or if the Act is bad in so much as it discriminates between two owners of coal, each holding by a valid title, the whole necessarily falls, it being impossible to say whether, passed as a whole, any part would have been enacted, had Congress known it was invalid in an important part. All the vital portions of an Act constituting a whole, have mutual relation, and any failure in any one vital part destroys the entire enactment. Such was the decision in the Income Tax Cases; and in the recent case in which the Employers' Liability Act was held invalid.

Due process of law in national, as well as in State, legislation, means uniformity of law; not necessarily uniformity as between different classes; but uniformity in each class, and, where no classification is possible, over the whole country.

A law does not fail to be uniform where it properly affects all the members of a class to whom alone it can reasonably, or properly, be applied.

As this court has said, however, repeatedly, non-uniformity cannot be sustained because sought to be effected under guise of a classification of that which cannot be classified.

Uniformity in legislation is absolutely essential in avoidance of injustice. Such is the constitution of human nature, that those who will suffer, will take care that no unnecessary suffering shall be inflicted, and those who will not suffer, will view, with indifference, legislation which will only result in the suffering of others.

In a country like ours, under the rule of the majority, which majority may have interests widely at variance with those of the minority, the only protection of the latter against unjust legislation, is to make the statute apply to all, to rich and to poor, to the weak and to the mighty.

In the matter of the actual transportation of timber and of coal, it might well be, that regulations for the

protection of the shipper, in the way of the kind of cars to be used, and in the precautions to be taken, might be applied to one kind of shipment and not to another.

If, however, the legislation rests, and can only rest, upon a public policy, applicable equally to all, there can be no classification. In the matter of determining whether murder, or arson, or burglary, may be committed, there can be no classification. In the matter of determining whether it is wrong to discriminate, or to make rebates, there can be none.

In like manner, if it be contrary to public policy, and if, because of being such, the union is forbidden, to unite in the carrier, ownership of the transportation and of the products transported, there can be no classification as between the carriers of different products. What is wrong in one case will be equally wrong in the other.

If the present legislation can be sustained, it must be upon the theory that the union in one corporation, of transportation and of ownership of the product transported, is contrary to public policy.

Would it have been possible, under the Sherman Act, to have made illegal, combinations in restraint of trade by some classes of carriers and to have permitted them by others? The question is answered, in the putting.

A statute of the United States, establishing a public policy, in the matter of uniformity, must stand upon the same basis as a statute of a State.

In Connolly *vs.* Union Sewer Pipe Co., 184 U. S., 560, it was held:—

> "These principles, applied to the case before us, "condemn the statute of Illinois. We have seen that "under that statute *all* except producers of agricul- "ture commodities and raisers of live stock, who "combine their capital, skill or acts for any of the "purposes named in the act, may be punished as "criminals, while agriculturists and live stock "raisers, in respect of their products or live stock "in hand, are exempted from the operation of the

"statute, and may combine and do that which, if "done by others, would be a crime against the State. "The statute so provides notwithstanding persons "engaged in trade or in the sale of merchandise and "commodities, within the limits of a State, and agri- "culturists and raisers of live stock, are all in the "same general class, that is, they are all alike en- "gaged in domestic trade, which is, of right, open "to all, subject to such regulations, applicable alike "to all in like conditions, as the State may legally "prescribe.

"The difficulty is not met by saying that, gener- "ally speaking, the State when enacting laws may, "in its discretion, make a classification of persons, "firms, corporations and associations, in order to "subserve public objects. For this court has held "that classification 'must always rest upon some dif- "'ference which bears a reasonable and just rela- "'tion to the act in respect to which the classifica- "'tion is proposed, and can never be made arbi- "'trarily and without any such basis. * * * But "'arbitrary selection can never be justified by calling "'it classification. The equal protection demanded "'by the Fourteenth Amendment forbids this. "'* * * No duty rests more imperatively upon "'the courts than the enforcement of those con- "'stitutional provisions intended to secure that "'equality of rights which is the foundation of free "'government. * * * It is apparent that the "'mere fact of classification is not sufficient to re- "'lieve a statute from the reach of the equality "'clause of the Fourteenth Amendment, and that "'in all cases it must appear not only that a classi- "'fication has been made but also that it is one "'based upon some reasonable ground—some dif- "'ference which bears a just and proper relation "'to the attempted classification—and is not a "'mere arbitrary selection' Gulf, Colorado and "Santa Fe Railway *vs.* Ellis, 165 U. S., 150, 155, 159, "160, 165. These principles were recognized and "applied in Cotting *vs.* Kansas City Stock Yards "Co., 183 U. S., 79, in which it was unanimously "agreed that a statute of Kansas regulating the

"charges of a particular stock yards company in the "State, but which exempted certain stock yards from "its operation, was repugnant to the Fourteenth "Amendment in that it denied to that company the "equal protection of the laws. * * *

"'The power of taxation under this provision "'was fully considered in Bell's Gap Railroad Co. "'*vs.* Pennsylvania, 134 U. S., 232, in which it was "'said not to have been intended to prevent a State "'from changing its system of taxation in all proper "'and reasonable ways. It may, if it chooses, ex- "'empt certain classes of property altogether; may "'impose different specific taxes upon different "'trades or professions; may vary the rates of "'excise upon various products; may tax real and "'personal estate in a different manner; may tax "'visible property only and not securities; may al- "'low or not allow deductions for indebtedness. "'All such regulations, and those of like character, "'so long as they proceed within reasonable limits "'and general usage, are within the discretion of "'the State legislature or the people of the State "'in framing their constitution.' Again: 'The dis- "'crimination is obviously intended as an encour- "'agement to agriculture, and does not deny to "'persons and corporations engaged in a general re- "'fining business the equal protection of the laws.' "

The Commodities Clause discriminates in three important particulars.

1. Between different owners of coal, without justification.

2. Between the carriers of timber and its manufactured products and the carriers of other commodities.

3. Between different classes of common carriers.

1. *As to discrimination between different owners of coal.*

In the case of the Delaware and Hudson Company, it appears that a large portion of the coal mined by

it, is sold in Pennsylvania, and is transported, thereafter, by it, solely on account of the purchasers in Pennsylvania. This is not the case with all the other defendants, it being impossible for them to make such sales in Pennsylvania to any large extent. Such sales, however, may, at times, be made, and, in the case of the Pennsylvania Railroad Company, are actually made.

If a railroad carrier mines coal in Pennsylvania, even though it sells it in that State, actually and absolutely, it is forbidden, by the Commodities Clause, thereafter to transport it on account, or for the benefit of, the purchaser.

What interest can the carrier have, in favoring any person whose coal is by it transported, after it has ceased to be the owner, because of the fact that once it was? What right will it have to deny such transportation? What power is vested in Congress to confer upon it such right or to impose upon it the duty to refuse?

The Act operates, not merely upon the railroad company, but upon the owner of the coal who needs transportation. A purchaser in Pennsylvania is possessed of coal he wishes to have transported to market in another State. Under the Act, if he has purchased the same from a person other than the railroad company which must transport it, he can insist upon its being carried into other States. If, however, the coal owned by him happens to have been purchased from a railroad company which, in pursuance of its charter and legal right, had mined the same, he cannot have it transported by the only carrier able to carry it.

The commodity to be transported, in each case, is the same. The reason for forbidding transportation in one, and for permitting it in the other, is simply because of the fact that title was once vested in a railroad company.

As we will endeavor to show hereafter, the question of acquisition of title in Pennsylvania is one beyond the power of Congress to control. None the less, be-

cause of an objection, not within its power to enforce, to a legal title, Congress discriminates between owners, each of whom, *quâ* the right of transportation, occupies the same position.

2. *As to discrimination in the matter of allowing transportation of timber and timber products.*

We have endeavored heretofore, generally, to establish the fact that there is no ground for discrimination, in the article exempted by the statute, because of the fact that the policy of law, sought to be enforced, is the same in all cases of carriage.

The result of the discrimination, in one particular, is, that timber, which is an article of fuel as well as is coal, can be transported by a carrier owner, whilst the coal cannot.

The manufactured products of timber are used in the arts and in building, competitively with the manufactured products of iron and steel. The Act, however, permits one to be carried and forbids the other.

The owner of timber is not protected against the supposed impolicy of permitting a railroad company to carry its own timber, whilst the owners of other products are.

3. *As to discrimination between the different classes of common carriers.*

There are common carriers, other than railroad companies, such as canal companies, pipe line companies, telegraph companies, express companies, and others. The canal may be parallel to, and competitive with, the railroad. The like may be the case with the pipe line company.

Whilst conceding that something may be said in favor of discrimination in favor of the companies we have named, yet, we submit, the principle upon which the prohibition is based is the same in the case of every common carrier.

IV. The Commodities Clause is unconstitutional because it forbids a railroad company, obeying every rule of transportation prescribed by Congress, to transport an article of commerce which not only is harmless, but is one of the necessaries of life. The act is not a regulation, but a prohibition.

In discussing this proposition, there is no difference between the rights of an individual and the rights of a corporation. As was said in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196, 204:—

> "Nor does it make any difference whether such "commerce is carried on by individuals or by corpo- "rations. Welton *vs.* Missouri, 91 U. S., 275; Mobile "*vs.* Kimball, 102 U. S., 691. As was said in Paul "*vs.* Virginia, 8 Wall., 168, at the time of the for- "mation of the Constitution, a large part of the "commerce of the world was carried on by corpora- "tions; and the East India Company, the Hudson "Bay Company, the Hamburgh Company, the "Levant Company, and the Virginia Company were "mentioned as among the corporations which, from "the extent of their operations, had become cele- "brated throughout the commercial world. The "grant of power is general in its terms, making no "reference to the agencies by which commerce may "be carried on. It includes commerce by whomso- "ever conducted whether by individuals or by "corporations. At the present day, nearly all en- "terprises of a commercial character, requiring for "their successful management large expenditures "of money, are conducted by corporations. The "usual means of transportation on the public waters, "where expedition is desired, are vessels propelled "by steam; and the ownership of a line of such "vessels generally requires an expenditure exceed- "ing the resources of single individuals. Except "in rare instances, it is only by associated capital "furnished by persons united in corporations, that "the requisite means are provided for such expen- "ditures."

In considering the Act we must bear in mind that it affects, not merely the right of the railroad company to transport; but that it also affects, (1) the right of the railroad company as an owner of, or interested in, coal (if an interest in shares be an interest in coal), holding a legal title thereto; (2) the right of other owners of the coal where the railroad company is but an owner in part; (3) the right of the coal companies whose shares are held wholly or partially; and (4) the right of the holders of a minority of the shares of the coal companies, where the railroad company holds the larger part thereof, and the right of the majority holders of shares of such companies where the railroad company holds the smaller portion thereof.

Undoubtedly, it was thought by Congress that the Lottery Case justified, to some extent, the Commodities Clause.

We submit, however, that nothing was decided in that case, justifying what is attempted to be done by the Commodities Clause.

In the Lottery Case, after it had been determined that the policy tickets were articles of commerce, it was held that the power of regulation possessed by Congress justified the prohibition of the carriage of these articles because such carriage would result in injury to the morals of the people. It was held by this court that there was no right to demand that commerce should be permitted in illegal articles; that the power to "regulate" included the right to exclude, what was not a legitimate article of commerce.

In the present case, the article carried is neither harmful to morals, nor to health. It is a necessity of life. The thing aimed at, is an interest of the carrier in the "*rem*" transported. It prevents the owner of an article, which is one of the necessities of commerce, from having the same transported because of its interest therein. The result of such prevention being that, if the owner of the coal does not sell its mines, or shares of coal stock, the citizens of many of the States will be deprived of an article absolutely needed.

It may not be amiss, in order that there may be no doubt as to precisely what was decided in the Lottery Case (188 U. S., 321) to quote, *in extenso*, from the decision (page 346):—

> "The leading case under the commerce clause of "the Constitution is Gibbons *vs.* Ogden, 9 Wheat., "1, 189, 194. Referring to that clause, Chief Justice "Marshall said: 'The subject to be regulated is com- "'merce; and our Constitution being, as was aptly "'said at the bar, one of enumeration, and not of "'definition, to ascertain the extent of the power, "'it becomes necessary to settle the meaning of the "'word. The counsel for the appellee would limit "'it to traffic, to buying and selling, or the inter- "'change of commodities, and do not admit that it "'comprehends navigation. This would restrict a "'general term, applicable to many objects, to one "'of its significations. Commerce, undoubtedly, is "'traffic, but it is something more; it is intercourse. "'It describes the commercial intercourse between "'nations, and parts of nations, in all its branches, "'and is regulated by prescribing rules for carrying "'on that intercourse. * * * It has been truly "'said, that commerce, as the word is used in the "'Constitution, is a unit, every part of which is "'indicated by the term. If this be the admitted "'meaning of the word, in its application to foreign "'nations, it must carry the same meaning through- "'out the sentence, and remain a unit, unless there "'be some plain intelligible cause which alters it. "'The subject to which the power is next applied, is "'to commerce, "among the several States." The "'word "among" means intermingled with. A thing "'which is among others is intermingled with them. "'Commerce among the States cannot stop at the "'external boundary line of each State, but may be "'introduced into the interior. It is not intended to "'say that these words comprehend that commerce, "'which is completely internal, which is carried on "'between man and man in a State, or between "'different parts of the same State, and which does "'not extend to or affect other States. Such a

"'power would be inconvenient and is certainly un-
"'necessary. Comprehensive as the word "among"
"'is, it may very properly be restricted to that
"'commerce which concerns more States than
"'one. * * * The genius and character of the
"'whole Government seem to be, that its action is
"'to be applied to all the external concerns of the
"'Nation, and to those internal concerns which
"'affect the States generally; but not to those which
"'are completely within a particular State, which
"'do not affect other States, and with which it is
"'not necessary to interfere, for the purpose of
"'executing some of the general powers of the
"'Government * * * '

"Again: 'We are now arrived at the inquiry—
"'what is this power? It is the power to regu-
"'late; that is, to prescribe the rule by which
"'commerce is to be governed. This power, like
"'all vested in Congress, is *complete in itself*, may
"'be exercised *to its utmost extent*, and acknowl-
"'edges *no limitations, other than are prescribed*
"'*in the Constitution*. These are expressed in plain
"'terms, and do not affect the questions which
"'arise in this case, or which have been discussed at
"'the bar. If, as has always been understood, the
"'sovereignty of Congress though limited to spe-
"'cific objects, is plenary as to those objects, the
"'power over commerce with foreign nations, and
"'among the several States, is vested in Congress
"'*as absolutely as it would be in a single government,*
"'*having in its constitution the same restrictions on*
"'*the exercise of the power as are found in the Con-*
"'*stitution of the United States.*'

"Mr. Justice Johnson in the same case, expressed
"his entire approbation of the judgment rendered by
"the court, but delivered a separate opinion indicat-
"ing the precise grounds upon which his conclusion
"rested. Referring to the grant of power over
"commerce he said: 'My opinion is founded on
"'the application of the words of the grant to the
"'subject of it. The "power to regulate commerce,"
"'here meant to be granted, was that power to regu-
"'late commerce which previously existed in the

"'States. But what was that power? The States "'were, unquestionably, supreme; and each pos- "'sessed that power over commerce, which is ac- "'knowledged to reside in every sovereign State. "'* * * The law of nations, regarding man as a "'social animal, pronounces all commerce legitimate, "'in a state of peace, until prohibited by positive "'law. The power of a sovereign State over com- "'merce, therefore, amounts to nothing more than "'a power to limit and restrain it at pleasure. And "'since the power to prescribe the limits to its free- "'dom, necessarily implies the power to determine "'what shall remain unrestrained, it follows that the "'power must be exclusive, it can reside but in one "'potentate; and hence, the grant of this power "'carries with it the whole subject, leaving noth- "'ing for the State to act upon.'

"The principles announced in Gibbons *vs.* Ogden "were reaffirmed in Brown *vs.* Maryland, 12 Wheat. "419, 446. After expressing doubt whether any of "the evils proceeding from the feebleness of the "Federal Government contributed more to the es- "tablishing of the present constitutional system than "the deep and general conviction that commerce "ought to be regulated by Congress Chief Justice "Marshall, speaking for the court, said: 'It is not "'therefore matter of surprise that the grant should "'be as extensive as the mischief and should com- "'prehend all foreign commerce, and all commerce "'among the States.' Considering the question as "to the just extent of the power to regulate com- "merce with foreign nations and among the several "States, the court reaffirmed the doctrine that the "power was 'complete in itself, and to acknowledge "'no limitations other than are prescribed by the "'Constitution. * * * Commerce is intercourse; "'one of its most ordinary ingredients is traffic.'

"In the Passenger Cases, 7 How., 283, the court "adjudged certain statutes of New York and Massa- "chusetts, imposing taxes upon alien passengers ar- "riving in the ports of those States, to be in viola- "tion of the Constitution and laws of the United "States. In the separate opinions delivered by the

"Justices there will not be found any expression of "doubt as to the doctrines announced in Gibbons "*vs.* Ogden. Mr. Justice McLean said: 'Commerce "'is defined to be "an exchange of commodities." "'But this definition does not convey the full mean-"'ing of the term. It includes "navigation and ""'"intercourse." That the transportation of pas-"'sengers is part of commerce is not now an open "'question.' Mr. Justice Grier said: 'Commerce "'as defined by this court, means something more "'than traffic—it is intercourse; and the power "'committed to Congress to regulate commerce "'is exercised by prescribing rules for carrying "'on that intercourse.' The same views were "expressed by Mr. Justice Wayne, in his separate "opinion. He regarded the question then before "the court as covered by the decision in Gibbons *vs.* "Ogden, and in respect to that case he said: 'It will "'always be a high and honorable proof of the emi-"'nence of the American bar of that day, and of the "'talents and distinguished ability of the judges "'who were then in the places which we now oc-"'cupy.' Mr. Justice Catron and Mr. Justice Mc-"Kinley announced substantially the same views. "* * *

"In County of Mobile *vs.* Kimball, 102 U. S. 691, "Mr. Justice Field, delivering the judgment of the "court, said: 'Commerce with foreign countries and "'among the States, strictly considered, consists in "'intercourse and traffic, including in these terms "'navigation and the transportation and transit of "'persons and property as well as the purchase, "'sale, and exchange of commodities.' This prin-"ciple was expressly reaffirmed in Gloucester Ferry "Co. *vs.* Pennsylvania, 114 U. S., 196, 203. * * *

"In Brown *vs.* Houston, 114 U. S., 622, 630, it "was declared by the court, speaking by Mr. Justice "Bradley, that 'the power to regulate commerce "'among the several States is granted to Congress "'in terms as absolute as is the power to regu-"'late commerce with foreign nations.' The same "thought was expressed in Bowman *vs.* Chicago, "&c., Railway Co., 125 U. S., 465, 482; Crutcher *vs.*

"Kentucky, 141 U. S., 47, 58, and Pittsburgh Coal "'Co. *vs.* Bates, 156 U. S., 577, 587. * * *

"At the present term of the court we said that "'transportation for others, as an independent busi- "'ness, is commerce, irrespective of the purpose to "'sell or retain the goods which the owner may "'entertain with regard to them after they shall "'have been delivered.' Hanley, &c., *vs.* Kansas "City Southern Railway, 187 U. S., 617. * * *

"In short, a lottery ticket is subject to traffic, "and is so designated in the act of 1895. 28 Stat., "963. That fact is not without significance in view "of what this court has said. That act, counsel for "the accused well remarks, was intended to supple- "ment the provisions of prior acts excluding lottery "tickets from the mails and prohibiting the importa- "tion of lottery matter from abroad, and to prohibit "the causing lottery tickets to be carried, and lot- "tery tickets and lottery advertisements to be trans- "ferred from one State to another by any means or "method. 15 Stat., 196; 17 Stat., 302; 19 Stat., 90; "Rev. Stat., Section 3894; 26 Stat., 465; 28 Stat., "963.

"We are of opinion that lottery tickets are sub- "jects of traffic and therefore are subjects of com- "merce, and the regulation of the carriage of such "tickets from State to State, at least by independent "carriers, is a regulation of commerce among the "several States. * * *

"It is to be remarked that the Constitution does "not define what is to be deemed a legitimate "regulation of interstate commerce. In Gibbons *vs.* "Ogden it was said that the power to regulate such "commerce is the power to prescribe the rule by "which it is to be governed. But this general obser- "vation leaves it to be determined when the question "comes before the court, whether Congress in "prescribing a particular rule has exceeded its "power under the Constitution. While our Gov- "ernment must be acknowledged by all to be one "of enumerated powers, McCulloch *vs.* Maryland, 4 "Wheat., 316, 405, 407, the Constitution does not "attempt to set forth all the means by which such

"powers may be carried into execution. It leaves "to Congress a large discretion as to the means "that may be employed in executing a given power. "The sound construction of the Constitution, this "court has said, 'must allow to the national legis- "'lature that discretion, with respect to the means "'by which the powers it confers are to be carried "'into execution, which will enable that body to "'perform the high duties assigned to it, in the "'manner most beneficial to the people. Let the "'end be legitimate, let it be within the scope of "'the Constitution, and all means which are appro- "'priate, which are plainly adapted to that end, "'which are not prohibited, but consist with the letter "' and spirit of the Constitution, are constitutional.' "4 Wheat., 421.

"We have said that the carrying from State to "State of lottery tickets constitutes interstate com- "merce and that the regulation of such commerce "is within the power of Congress under the Con- "stitution. Are we prepared to say that a pro- "vision which is, in effect, a *prohibition* of the "carriage of such articles from State to State is "not a fit or appropriate mode for the *regulation* "of that particular kind of commerce? If lottery "traffic, *carried on through interstate commerce*, is a "matter of which Congress may take cognizance and "over which its power may be exerted, can it be "possible that it must tolerate the traffic, and "simply regulate the manner in which it may be "carried on? Or may not Congress, for the pro- "tection of the people of all the States, and under "the power to regulate interstate commerce, devise "such means, within the scope of the Constitution, "and not prohibited by it, as will drive that traffic "out of commerce among the States?

"In determining whether regulation may not "under some circumstances properly take the form "or have the effect of prohibition, the nature of the "interstate traffic which it was sought by the Act "of May 2d, 1895, to suppress cannot be overlooked. "When enacting that statute Congress no doubt

"shared the views upon the subject of lotteries "heretofore expressed by this court. * * *

"If a State, when considering legislation for the "suppression of lotteries within its own limits, may "properly take into view the evils that inhere in the "raising of money, in that mode, why may not Con- "gress, invested with the power to regulate com- "merce among the several States, provide that such "commerce shall not be polluted by the carrying of "lottery tickets from one State to another? In this "connection it must not be forgotten that the power "of Congress to regulate commerce among the States "is plenary, is complete in itself, and is subject to "no limitations except such as may be found in the "Constitution. What provision in that instrument "can be regarded as limiting the exercise of the "power granted? What clause can be cited which, "in any degree, countenances the suggestion that "one may, of right, carry or cause to be carried "from one State to another that which will harm "the public morals? We cannot think of any clause "of that instrument that could possibly be invoked "by those who assert their right to send lottery "tickets from State to State except the one providing "that no person shall be deprived of his liberty "without due process of law. We have said that "the liberty protected by the Constitution embraces "the right to be free in the enjoyment of one's "faculties; 'to be free to use them in all lawful "'ways; to live and work where he will; to earn "'his livelihood by any lawful calling; to pursue "'any livelihood or avocation, and for that purpose "'to enter into all contracts that may be proper.' "Allgeyer *vs.* Louisiana, 165 U. S., 578, 589. But "surely it will not be said to be a part of any one's "liberty, as recognized by the supreme law of the "land, that he shall be allowed to introduce into com- "merce among the States an element that will be "confessedly injurious to the public morals. * * *

"If the carrying of lottery tickets from one State "to another be interstate commerce, and if Congress "is of opinion that an effective regulation for the "suppression of lotteries carried on through such

"commerce, is to make it a criminal offense to cause "lottery tickets to be carried from one State to "another, we know of no authority in the courts to "hold that the means thus devised are not appro- "priate and necessary to protect the country at large "against a species of interstate commerce which, "although in general use and somewhat favored in "both national and State legislation in the early "history of the country, has grown into disrepute "and has become offensive to the entire people of "the Nation. It is a kind of traffic which no one can "be entitled to pursue as of right.

"That regulation may sometimes appropriately "assume the form of prohibition is also illustrated "by the case of diseased cattle, transported from "one State to another. * * *

"The Act of July 2d, 1890, known as the Sherman "Anti-Trust Act, and which is based upon the power "of Congress to regulate commerce among the "States, is an illustration of the proposition that "regulation may take the form of prohibition. The "object of that Act was to protect trade and com- "merce against unlawful restraints and monopolies. "To accomplish that object Congress declared cer- "tain contracts to be illegal. That Act, in effect, "prohibited the doing of certain things, and its pro- "hibitory clauses have been sustained in several "cases as valid under the power of Congress to "regulate interstate commerce. * * *

"'Under this grant of power to Congress, that "'body, in our judgment, may enact such legislation "'as shall declare void and *prohibit* the performance "'of any contract between individuals or corpora- "'tions where the natural and direct effect of such a "'contract will be, when carried out, to directly, and "'not as a mere incident to other and innocent pur- "'poses, regulate to any substantial extent inter- "'state commerce. (And when we speak of inter- "'state we also include in our meaning foreign com- "'merce.) We do not assent to the correctness of "'the proposition that the constitutional guaranty "'of liberty to the individual to enter into private "'contracts limits the power of Congress and pre-

"'vents it from legislating upon the subject of con-
"'tracts of the class mentioned. The power to regu-
"'late interstate commerce is, as stated by Chief
"'Justice Marshall, full and complete in Congress,
"'and there is no limitation in the grant of the power
"'which excludes private contracts of the nature in
"'question from the jurisdiction of that body. Nor
"'is any such limitation contained in that other
"'clause of the Constitution which provides that no
"'person shall be deprived of life, liberty, or prop-
"'erty without due process of law.' Again: 'The
"'provision in the Constitution does not, as we be-
"'lieve, exclude Congress from legislating with re-
"'gard to contracts of the above nature while in the
"'exercise of its constitutional right to regulate
"'commerce among the States. On the contrary,
"'we think the provision regarding the liberty of the
"'citizen is, to some extent, limited by the commerce
"'clause of the Constitution, and that the power of
"'Congress to regulate interstate commerce com-
"'prises the right to enact a law *prohibiting* the citi-
"'zen from entering into those private contracts
"'which directly and substantially, and not merely
"'indirectly, remotely, incidentally, and collaterally
"'regulate to a greater or less degree commerce
"'among the States.'

"That regulation may sometimes take the form "or have the effect of prohibition is also illustrated "in the case of *In re* Rahrer, 140 U. S., 545. In "Mugler *vs.* Kansas, 123 U. S., 623, it was adjudged "that State legislation prohibiting the manufacture "of spirituous, malt, vinous, fermented or other in-"toxicating liquors within the limits of the State, "to be there sold or bartered for general use as a "beverage, does not necessarily infringe any right, "privilege or immunity secured by the Constitution "of the United States or by the amendments thereto. "Subsequently in Bowman *vs.* Chicago, &c., Rail-"way Co., 125 U. S., 465, this court held that ardent "spirits, distilled liquors, ale, and beer were subjects "of exchange, barter, and traffic, and were so recog-"nized by the usages of the commercial world, as "well as by the laws of Congress and the decisions

"of the courts. In Leisy *vs.* Hardin, 135 U. S., 100, "the court again held that spirituous liquors were "recognized articles of commerce, and declared a "statute of Iowa prohibiting the sale within its lim- "its of any intoxicating liquors, except for pharma- "ceutical, medicinal, chemical or sacramental pur- "poses, under a State license, to be repugnant to "the commerce clause of the Constitution, if applied "to the sale, within the State, by the importer, in "the original, unbroken packages, of such liquors "manufactured in and brought from another State. "And in determining whether a State could prohibit "the sale within its limits, in original, unbroken pack- "ages, of ardent spirits, distilled liquors, ale, and "beer, imported from another State, this court said "that they were recognized by the laws of Congress "as well as by the commercial world 'as subjects "'of exchange, barter, and traffic,' and that 'what- "'ever our individual views may be as to the dele- "'terious or dangerous qualities of particular articles, "'we cannot hold that any articles which Congress "'recognized as subjects of commerce are not such.' "Leisy *vs.* Hardin, 135 U. S., 100, 110, 125. * * *

"It is said, however, that if, in order to suppress "lotteries carried on through interstate commerce, "Congress may exclude lottery tickets from such "commerce, that principle leads necessarily to the "conclusion that Congress may arbitrarily exclude "from commerce among the States any article, com- "modity or thing, of whatever kind or nature, or "however useful or valuable, which it may choose, "no matter with what motive, to declare shall not "be carried from one State to another. It will be "time enough to consider the constitutionality of "such legislation when we must do so. The present "case does not require the court to declare the full "extent of the power that Congress may exercise in "the regulation of commerce among the States. We "may, however, repeat, in this connection, what the "court has heretofore said, that the power of Con- "gress to regulate commerce among the States, "although plenary, cannot be deemed arbitrary, "since it is subject to such limitations or restric-

"tions as are prescribed by the Constitution. This "power, therefore, may not be exercised so as to "infringe rights secured or protected by that instru- "ment. It would not be difficult to imagine legisla- "tion that would be justly liable to such an objec- "tion as that stated, and be hostile to the objects for "the accomplishment of which Congress was in- "vested with the general power to regulate com- "merce among the several States. But, as often "said, the possible abuse of a power is not an argu- "ment against its existence. There is probably no "governmental power that may not be exerted to "the injury of the public. If what is done by Con- "gress is manifestly in excess of the powers granted "to it, then upon the courts will rest the duty of ad- "judging that its action is neither legal nor binding "upon the people. But if what Congress does is "within the limits of its power, and is simply un- "wise or injurious, the remedy is that suggested by "Chief Justice Marshall in Gibbons *vs.* Ogden, when "he said: 'The wisdom, and the discretion of Con- "'gress, their identity with the people and the in- "'fluence which their constituents possess at elec- "'tions, are, in this, as in many other instances, as "'that, for example, of declaring war, the sole re- "'straints on which they have relied, to secure them "'from its abuse. They are the restraints on which "'the people must often rely solely, in all represent- "'ative governments.'

"The whole subject is too important, and the "questions suggested by its consideration are too "difficult of solution, to justify any attempt to lay "down a rule for determining in advance the valid- "ity of every statute that may be enacted under the "commerce clause. We decide nothing more in the "present case than that lottery tickets are subjects "of traffic among those who choose to sell or buy "them; that the carriage of such tickets by inde- "pendent carriers from one State to another is "therefore interstate commerce; that under its "power to regulate commerce among the several "States Congress—subject to the limitations im-

"posed by the Constitution upon the exercise of the "powers granted—has plenary authority over such "commerce, and may prohibit the carriage of such "tickets from State to State; and that legislation to "that end, and of that character is not inconsistent "with any limitation or restriction imposed upon the "exercise of the powers granted to Congress."

What is included in the word "commerce" has been well settled by numerous decisions. It is stated as concisely as in any other case, in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196, 203, where it is said:—

"It matters not that the transportation is made "in ferryboats, which pass between the States every "hour of the day. The means of transportation of "persons and freight between the States does not "change the character of the business as one of com- "merce, nor does the time within which the distance "between the States may be traversed. Commerce "among the States consists of intercourse and traffic "between their citizens, and includes the transpor- "tation of persons and property, and the navigation "of public waters for that purpose, as well as the "purchase, sale, and exchange of commodities. "The power to regulate that commerce, as well as "commerce with foreign nations, vested in Congress, "is the power to prescribe the rules by which it "shall be governed, that is, the conditions upon "which it shall be conducted, to determine when it "shall be free and when subject to duties or other "exactions. The power also embraces within its "control all the instrumentalities by which that "commerce may be carried on, and the means by "which it may be aided and encouraged. The "subjects, therefore, upon which the power may be "exerted are of infinite variety. While with refer- "ence to some of them, which are local and limited "in their nature or sphere of operation, the States "may prescribe regulations until Congress intervenes "and assumes control of them; yet, when they are "national in their character, and require uniformity

"of regulation affecting alike all the States, the "power of Congress is exclusive. Necessarily that "power alone can prescribe regulations which are to "govern the whole country. And it needs no argu- "ment to shew that the commerce with foreign "nations and between the States, which consists "in the transportation of persons and property "between them, is a subject of national character, "and requires uniformity of regulation."

In ascertaining what is covered by the power to "reg- "ulate," it is well to bear in mind that the meaning of the word is, "to adjust by rule, method or established mode."

Whilst prohibition of the transportation of articles injurious to health or morals is included within the idea of a regulation of commerce, a prohibition of such transportation, where the articles are necessaries of life, is not within such idea. A requirement that transportation shall be conducted without favoritism, or discrimination, and not at excessive rates, is included within our idea of a regulation. Congress may forbid contracts in restraint of trade, because such contracts interfere with commerce and indirectly regulate the same. In this connection, it may not be amiss to quote what is said by Mr. Justice Peckham in the Addyston case, 175 U. S., 211, 226:—

"Assuming for the purpose of the argument, that "the contract in question herein does directly and "substantially operate as a restraint upon and as a "regulation of interstate commerce, it is yet insisted "by the appellants at the threshold of the inquiry "that by the true construction of the Constitution, "the power of Congress to regulate interstate com- "merce is limited to its protection from acts of in- "terference by State legislation or by means of regu- "lations made under the authority of the State by "some political subdivision thereof, including also "Congressional power over common carriers, ele- "vator, gas and water companies, for reasons stated "to be peculiar to such carriers and companies, but "that it does not include the general power to

"interfere with or prohibit private contracts between "citizens, even though such contracts have inter- "state commerce for their object, and result in a "direct and substantial obstruction to or regulation "of that commerce.

"This argument is founded upon the assertion "that the reason for vesting in Congress the power "to regulate commerce was to insure uniformity of "regulation against conflicting and discriminating "State legislation; and the further assertion that the "Constitution guarantees liberty of private contract "to the citizen at least upon commercial subjects, "and to that extent the guaranty operates as a lim- "itation on the power of Congress to regulate com- "merce. * * * The further remark is quoted "from Railroad Company *vs.* Richmond, *supra*, that "the power of Congress to regulate commerce was "never intended to be exercised so as to interfere "with private contracts not designed at the time "they were made to create impediments to such "commerce. It is added that the proof herein "shows that the contract in this case was not so "designed. * * *

"The power to regulate interstate commerce is, "as stated by Chief Justice Marshall, full and com- "plete in Congress, and there is no limitation in the "grant of the power which excludes private con- "tracts of the nature in question from the juris- "diction of that body. Nor is any such limitation "contained in that other clause of the Constitution "which provides that no person shall be deprived "of life, liberty or property without due process of "law. It has been held that the word 'liberty' as "used in the Constitution, was not to be confined to "the mere liberty of person, but included, among "others, a right to enter into certain classes of con- "tracts for the purpose of enabling the citizen to "carry on his business. Allegeyer *vs.* Louisiana, 165 "U. S. 578; United States *vs.* Joint Traffic Associa- "tion, 171 U. S. 505, 572. But it has never been, "and in our opinion ought not to be, held that the "word included the right of an individual to enter

into private contracts upon all subjects no mat-
"ter what their nature and wholly irrespective
"(among other things) of the fact that they would,
"if performed, result in the regulation of inter-
"state commerce and in the violation of an Act of
"Congress upon that subject. The provision in the
"Constitution does not, as we believe, exclude
"Congress from legislating with regard to contracts
"of the above nature while in the exercise of its
"constitutional right to regulate commerce among
"the States. On the contrary, we think the provision
"regarding the liberty of the citizen is, to some
"extent, limited by the commerce clause of the
"Constitution, and that the power of Congress to
"regulate interstate commerce comprises the right to
"enact a law prohibiting the citizen from entering
"into those private contracts which directly and
"substantially, and not merely indirectly, remotely,
"incidentally and collaterally, regulate to a greater
"or less degree commerce among the States."

Where articles are forbidden to be transported because the owner is engaged in the carriage of like commodities for itself as well as for others, such forbidding goes beyond the province of regulation and introduces something not within the grant of a power to regulate, *i. e.*, a condemnation of a duality of ownership and transportation which had resulted from legislation by the States, in a matter over which they had control. It practically takes away property, or at least destroys the value of property, vested in its owner by the law of the only country which can control it, *i. e.*, the State in which it is located.

Commerce does not result from any grant in the Constitution, to Congress, of power to permit or disallow the same, nor from any permission by Congress. It is an inherent right, possessed by every citizen. A prohibition, therefore, which does not regulate the right, but denies and destroys it, must rest upon a power different from that granted by a permission to regulate.

The very grant of power to regulate commerce, recognizes the existence of a right to carry it on, derived from some other, and independent, source.

At the time the Constitution was adopted, commerce amongst the States existed. The power to regulate was given, not concerning something to come thereafter into existence, but concerning something then actually existing, the nature of which was thoroughly understood. The Union largely resulted from the wish to insure its continuance.

The adoption was because the different States desired, not a prohibited, but a more thoroughly protected, commerce.

In Hale *vs.* Henkle, 201 U. S., 43, 75, speaking of a corporation chartered under the laws of New Jersey, whilst admitting that its franchises were derived from the Legislature of that State, it was held by this court that the same must be exercised in subordination "to the power "of Congress to regulate such commerce." It was asserted that in respect to such subordination of exercise

> "the General Government may also assert a sover-
> "eign authority to ascertain whether such franchises
> "have been exercised in a lawful manner, with due
> "regard to its own laws."

It was added:—

> "Being subject to this dual sovereignty, the
> "General Government possesses the same right
> "to see that its own laws are respected as the
> "State would have with respect to the special
> "franchises vested in it by the laws of the State.
> "The powers of the General Government in this
> "particular in the vindication of its own laws,
> "are the same as if the corporation had been created
> "by an Act of Congress. It is not intended to
> "intimate, however, that it has a general visi-
> "tatorial power over State corporations."

In other words, the inherent right of interstate intercourse must be exercised under the supervision and control, by way of "regulation," of the General Government; but the right, itself, is independent of the General Government and must be permitted to be exercised. The right

to regulate, recognizes the existence, and power to continue, but compels action, in accordance with such rules as are necessary, to secure a non-discriminating and proper, transportation.

The right of property is one secured to every citizen of the United States, under and against the Government, by the Constitution of the United States. This right, which, as will be probably conceded, includes that of commerce, is taken away by the Commodities Clause. Countless hundreds of millions of dollars of property values are destroyed at a stroke of the Congressional pen, without evidence of the existence of any necessity for such destruction.

The interstate commerce which is forbidden by the Commodities Clause is (1) transportation of its own products by a railroad company; and (2) sales by the citizens of one State, of their property, to citizens of another State, under certain circumstances.

Whilst conceding the right to regulate the transportation in such way and manner as to compel it to conform to all such reasonable rules as the Legislature may prescribe, we deny the right to prohibit it where such rules are complied with. Included in this denial, is a denial of the conclusion that duality of ownership and of transportation, *ex necessitate*, amounts to violation of such rules of transportation. We deny the claim that an owner of property may be deprived of its beneficial use because, acting also as a transporter, it *may* do something in violation of the law, and *may* transport in such way as will favor itself and disfavor another shipper. Even though there be no such duality, the *possibility* of evil doing is limitless.

Our contention is, that neither intercourse between the States, involving a carriage of persons or of property, nor transactions of sale and purchase, involving a delivery, can be forbidden, unless the person against whom the prohibition goes, violates some law enacted properly in exercise of the power to regulate.

As we have said, such intercourse is prevented by the Commodities Clause, because the owner of coal

in most instances can transport it into another State only through the instrumentality of the very railroad company forbidden to make the transportation.

If, at the present time, a railroad company, incorporated under the law of Pennsylvania, should purchase coal lands under authority conferred by that Commonwealth, it would thereby enter into no combination in restraint of trade. The railroad and coal lands are both located in the State of Pennsylvania. The transportation of coal owned by the carrier, in interstate commerce, is not a carriage in restraint of trade. Such carriage violates no right of other persons, or of the Government. It *may* be so conducted, as to violate the rights of others, sought to be secured by proper regulations by Congress. If so, it can be punished. Punishment, however, legally inflicted, results from the doing of an illegal act. It is contrary to the Anglo-Saxon sense of justice, to inflict it before commission of such act. We are confronted by a judgment, rendered, not by Courts of Justice, but by Congress.

The regulation must be "reasonable." The thing commanded must bear some relation to that which is within the power of Congress to prescribe.

Congress has not exercised a police power. What it has done, has been merely to exercise its power to regulate commerce. This power, however, is not more extensive than that vested in the States, over persons and property, in intrastate transactions.

To prevent favoritism and discrimination, it is not necessary to deprive the carrier of its right to transport; to render useless hundreds of millions of dollars of improvements; or, practically, to destroy the value of property by forbidding its transportation. Punishment is excessive where, not because of wrong doing, but because of a fear of wrong doing, the carrier is practically deprived of what it owns.

The right of the State to regulate intrastate commerce, has repeatedly been held by this court to be not

properly exercised where the carrier has been obliged to carry at non-remunerative rates. In the present case, if the carrier is deprived of the right to transport its own coal, or that of companies in which it is a shareholder, it will be impossible for it, though obliged to perform its duties as a carrier, to earn a sufficient remuneration for the services it will render and for the property which it will employ. Deprived of their freights upon interstate coal transportation, none of the defendants can live. The expenditures which have been made upon main tracks and terminals, have been made with a view to transporting inter, more than intra, state commerce. Enormous sums have been expended at terminal points outside the State, to secure safe and speedy handling and storage of coal. Most of their daily expenses must be maintained, and interest upon loans must be paid. If interstate transportation of the carriers' own coal can be prevented, the result must be financial death.

Nothing can be more unreasonable than to say to a person who owns coal, where a common carrier has a part ownership therein, that his coal shall not be carried because the carrier has such part interest. How can the owner prevent the acquisition by the carrier, of the title of a co-coal owner?

Can anything be more unreasonable than to say to a coal company which is conducting business upon its own account, possibly doing nothing more than meeting its expenses and the interest upon its indebtedness, that it shall not have its coal transported because the carrier which must transport it, is an owner of a majority of its shares? Why should it be punished? If it be unreasonable to make such prohibition of transportation even where the carrier is a majority owner, what must be said as to the unreasonableness of such prevention where the carrier owns a minority of the shares?

What can be more unreasonable, than to say to an owner of coal who has purchased it in Pennsylvania, from a carrier by whom it had been mined under the

laws of Pennsylvania, that he shall not have it delivered in another State? This is, however, what is said, inasmuch as the carrier vendor is usually the only corporation which can transport. If the Commodities Clause be unreasonable in any of these particulars, it must fall, as did the Employers' Liability Act, because of the invalidity of one of its portions.

In this connection, it may be well to quote what has been, from time to time, said by this court, speaking through some of its greatest judges. Having already quoted *in extenso* from the Lottery Case, we will not again repeat what has already been presented.

In Northern Securities Co. *vs.* United States, 193 U. S., 197, 199, it was held:—

> "Under its power to regulate commerce among "the several States and with foreign nations. Con- "gress had authority to enact the statute in ques- "tion. United States *vs.* E. C. Knight Co., 156 "U. S., 1; United States *vs.* Trans-Missouri Freight "Association, 166 U. S., 290; United States *vs.* "Joint Traffic Association, 171 U. S., 505; Hop- "kins *vs.* United States, 171 U. S., 578; Anderson "*vs.* United States, 171 U. S., 604; Addyston Pipe "& Steel Co. *vs.* United States, 175 U. S., 211; 'Montague & Co. *vs.* Lowry, 193 U. S., 38.
>
> "Congress may protect the freedom of inter- "state commerce by any means that are appro- "priate and that are lawful and not prohibited "by the Constitution.
>
> "If in the judgment of Congress the public con- "venience or the general welfare will be best sub- "served when the natural laws of competition are "left undisturbed by those engaged in interstate "commerce, that must be, for all, the end of the "matter, if this is to remain a government of laws, "and not of men.
>
> "When Congress declared contracts, combina- "tions and conspiracies in restraint of trade or "commerce to be illegal, it did nothing more than "apply to interstate commerce a rule that had "been long applied by the several States when

"dealing with combinations that were in restraint "of their domestic commerce.

"Subject to such restrictions as are imposed by "the Constitution upon the exercise of all power, "the power of Congress over interstate and inter- "national commerce is as full and complete as is "the power of any State over its domestic com- "merce.

"No State can, by merely creating a corporation, "or in any other mode, project its authority into "other States, so as to prevent Congress from "exerting the power it possesses under the Con- "stitution over interstate and international com- "merce, or so as to exempt its corporation en- "gaged in interstate commerce from obedience "to any rule lawfully established by Congress for "such commerce; nor can any State give a cor- "poration created under its laws authority to "restrain interstate or international commerce "against the will of the nation as lawfully ex- "pressed by Congress. Every corporation created "by a State is necessarily subject to the supreme "law of the land.

"Whilst every instrumentality of domestic com- "merce is subject to State control, every instru- "mentality of interstate commerce may be reached "and controlled by national authority, so far as "to compel it to respect the rules for such com- "merce lawfully established by Congress."

In Gibbons *vs.* Ogden, 9 Wheaton, 1, 196, it was said:—

"It is the power to regulate; that is, to pre- "scribe the rule by which commerce is to be gov- "erned. This power, like all others vested in "Congress, is complete in itself, may be exercised "to its utmost extent, and acknowledges no limi- "tations, other than are prescribed in the Con- "stitution. These are expressed in plain terms, "and do not affect the questions which arise in "this case, or which have been discussed at the "bar. If, as has always been understood, the "sovereignty of Congress, though limited to spe-

"cified objects, is plenary as to those objects, the "power over commerce with foreign nations, and "among the several States, is vested in Congress "as absolutely as it would be in a single govern- "ment, having in its constitution the same restric- "tions on the exercise of the power as are found "in the Constitution of the United States. The "wisdom and the discretion of Congress, their "identity with the people, and the influence which "their constituents possess at elections, are, in "this, as in many other instances, as that, for ex- "ample, of declaring war, the sole restraints on "which they have relied, to secure them from its "abuse. They are the restraints on which the "people must often rely solely, in all represent- "ative governments.

* * * * * *

"In pursuing this inquiry at the bar, it has been "said, that the Constitution does not confer the right "of intercourse between State and State. That right "derives its source from those laws whose au- "thority is acknowledged by civilized man through- "out the world. This is true. The Constitution "found it an existing right, and gave to Congress "the power to regulate it. In the exercise of this "power, Congress has passed 'an act for enrolling "'or licensing ships or vessels to be employed in "'the coasting trade and fisheries and for regulat- "'ing the same.' The counsel for the respondent "contend that this act does not give the right to "sail from port to port, but confines itself to regu- "lating a pre-existing right, so far only as to con- "fer certain privileges on enrolled and licensed ves- "sels in its exercise.

In Adair *vs.* United States, 208 U. S., 161, it was held:—

"It is not within the power of Congress to make "it a criminal offense against the United States for "a carrier engaged in interstate commerce, or an "agent or officer thereof, to discharge an employe "simply because of his membership in a labor organ- "ization; and the provision to that effect in §10 of

"the act of June 1, 1898, 30 Stat., 424, concerning "interstate carriers is an invasion of personal "liberty, as well as of the right of property, guaran- "teed by the Fifth Amendment to the Constitution "of the United States, and is therefore unenforceable "as repugnant to the declaration of that amendment "that no person shall be deprived of liberty or "property without due process of law.

"While the rights of liberty and property guar- "anteed by the Constitution against deprivation "without due process of law, are subject to such "reasonable restrictions as the common good or "general welfare may require, it is not within the "functions of government—at least in the absence "of contract—to compel any person in the course "of his business, and against his will, either to em- "ploy, or be employed by, another. An employer "has the same right to prescribe terms on which he "will employ one to labor as an employe has to pre- "scribe those on which he will sell his labor, and any "legislation which disturbs this equality is an "arbitrary and unjustifiable interference with liberty "of contract.

"*Quaere*, and not decided, whether it is within the "power of Congress to make it a criminal offense "against the United States for either an employer "engaged in interstate commerce, or his employe, "to disregard, without sufficient notice or excuse, "the terms of a valid labor contract.

"The power to regulate interstate commerce is "the power to prescribe rules by which such com- "merce must be governed, but the rules prescribed "must have a real and substantial relation to, or "connection with, the commerce regulated, and as "that relation does not exist between the member- "ship of an employe in a labor organization and "the interstate commerce with which he is con- "nected, the provision above referred to in §10 of "the act of June 1, 1898, cannot be sustained as a "regulation of interstate commerce and as such "within the competency of Congress.

"The power to regulate interstate commerce, "while great and paramount, cannot be exerted in

"violation of any fundamental right secured by "other provisions of the National Constitution."

The court said (page 173):—

"Mr. Cooley, in his treatise on Torts, page 278, "well says: 'It is a part of every man's civil rights "'that he be left at liberty to refuse business rela- "'tions with any person whomsoever, whether "'the refusal rests upon reason, or is the result of "'whim, caprice, prejudice or malice. With his "'reasons neither the public nor third persons "'have any legal concern. It is also his right to "'have business relations with any one with whom "'he can make contracts, and if he is wrongfully "'deprived of this right by others, he is entitled "'to redress.'

"In Lochner *vs.* New York, 198 U. S. 45, 53, 56, "which involved the validity of a state enactment "prescribing certain maximum hours for labor in "bakeries, and which made it a misdemeanor for an "employer to require or permit an employe in such "an establishment to work in excess of a given num- "ber of hours each day, the court said: 'The general "'right to make a contract in relation to his business "'is part of the liberty of the individual protected by "'the Fourteenth Amendment of the Federal Con- "'stitution. Allgeyer *v.* Louisiana, 165 U. S. 578. "'* * * There are, however, certain powers, ex- "'isting in the sovereignty of each State in the "'Union, somewhat vaguely termed police powers, "'the exact description and limitation of which have "'not been attempted by the courts. These powers, "'broadly stated and without, at present, any at- "'tempt at a more specific limitation, relate to the "'safety, health, morals and general welfare of the "'public. Both property and liberty are held on "'such reasonable conditions as may be imposed by "'the governing power of the State in the exercise of "'those powers, and with such conditions the Four- "'teenth Amendment was not designed to interfere. "'Mugler *v.* Kansas, 123 U. S., 623; *In re* Kemmler, "'136 U. S., 436; Crowley *v.* Christensen, 137 U. S., "'86; *In re* Converse, 137 U. S., 624. * * * In

"'every case that comes before this court, therefore,
"'where legislation of this character is concerned,
"'and where the protection of the Federal Consti-
"'tution is sought, the question necessarily arises:
"'Is this a fair, reasonable and appropriate exercise
"'of the police power of the State, or is it an un-
"'reasonable, unnecessary and arbitrary interfer-
"'ence with the right of the individual to his personal
"'liberty or to enter into those contracts in relation
"'to labor which may seem to him appropriate or
"'necessary for the support of himself and his
"'family? Of course the liberty of contract relating
"'to labor includes both parties to it. The one has
"'as much right to purchase as the other to sell labor.'
"Although there was a difference of opinion in that
"case among the members of the court as to certain
"propositions, there was no disagreement as to the
"general proposition that there is a liberty of con-
"tract which cannot be unreasonably interfered with
"by legislation. The minority were of opinion that
"the business referred to in the New York statute
"was such as to require regulation, and that as the
"statute was not shown plainly and palpably to have
"imposed an unreasonable restraint upon freedom of
"contracts, it should be regarded by the courts as a
"valid exercise of the State's power to care for the
"health and safety of its people. * * *

"Looking alone at the words of the statute for
"the purpose of ascertaining its scope and effect,
"and of determining its validity, we hold that there
"is no such connection between interstate commerce
"and membership in a labor organization as to
"authorize Congress to make it a crime against the
"United States for an agent of an interstate carrier
"to discharge an employe because of such member-
"ship on his part. If such a power exists in Con-
"gress it is difficult to perceive why it might not,
"by absolute regulation, require interstate carriers,
"under penalties, to employ in the conduct of its
"interstate business *only* members of labor organ-
"izations, or *only* those who are *not* members of
"such organizations—a power which could not be
"recognized as existing under the Constitution of
"the United States."

In Dobbins *vs.* Los Angeles, 195 U. S., 223, 236, it was said:—

"In Lawton *v.* Steele, 152 U. S., 133, 137, Mr. "Justice Brown, speaking for the court, said upon "this subject:

"'To justify the State in thus interposing its "'authority in behalf of the public, it must appear, "'first, that the interests of the public generally, "'as distinguished from those of a particular class, "'require such interference; and, second, that the "'means are reasonably necessary for the accom- "'plishment of the purpose, and not unduly oppres- "'sive upon individuals. The legislature may not, "'under the guise of protecting the public interests, "'arbitrarily interfere with private business or "'impose unusual and unnecessary restrictions upon "'lawful occupations. In other words, its deter- "'mination as to what is a proper exercise of its "'police powers is not final or conclusive, but is "'subject to the supervision of the courts.'

"And, again, in Holden *v.* Hardy, 169 U. S., 366, "398, the same justice, again speaking for the court, "said:

"'The question in each case is whether the legis- "'lature has adopted the statute in exercise of a "'reasonable discretion, or whether its action be a "'mere excuse for an unjust discrimination, or the "'oppression or spoliation of a particular class' "* * *.

"'But, running current with this principle, and "'to be read with it, is one of equal importance, "'namely, that when the police power is exerted to "'regulate a useful business or occupation, the "'legislature is not the exclusive judge as to what "'is a reasonable and just restraint upon the con- "'stitutional right of the citizen to pursue any trade, "'business or vocation, which in itself is recognized "'as innocent and useful to the community. It "'is always a judicial question if any particular "'regulation of such right is a valid exercise of "'police power, though the power of the courts to "'declare such regulation invalid will be exercised

"'with the utmost caution, and only where it is "'clear that the ordinance or law declared void "'passes the limits of the police powers, and in- "'fringes upon rights guaranteed by the Constitu- "'tion.'

"Applying the principles settled by these decis- "ions to the allegations of the bill, admitted by "the demurrer, we think a case is made which "called for the protection of the courts against "arbitrary interference with the rights of the plain- "tiff in error. Complying with the terms of the "ordinance which was in force when the plaintiff "in error was about to begin the erection of the "gas works in controversy, a tract of land was "purchased within the district wherein the erection "of such works was permitted, a contract was "entered into for the construction of the works, "a considerable sum of money was expended. It "may be admitted as being a correct statement "of the law as held by the California Supreme "Court that, notwithstanding the grant of the "permit, and even after the erection of the works, "the city might still, for the protection of the "public health and safety, prohibit the further "maintenance and continuance of such works, "and the prosecution of the business, originally "harmless, may become, by reason of the manner "of its prosecution or a changed condition of the "community, a menace to the public health and "safety. In other words, the right to exercise the "police power is a continuing one, and a business "lawful to-day may in the future, because of the "changed situation, the growth of population or "other causes, become a menace to the public "health and welfare, and be required to yield to "the public good. Fertilizing Co. *v.* Hyde Park, "97 U. S., 659; New Orleans Gas Co. *v.* Louisiana "Light Co., 115 U. S., 650, 672. But the exercise "of the police power is subject to judicial review "and property rights cannot be wrongfully de- "stroyed by arbitrary enactment. It was averred "that the works would be so constructed so as "not to interfere with the health or safety of the

"people. No reasonable explanation for the ar-
"bitrary exercise of power in the case is suggested.
"The narrowing of the limits within which the
"plaintiff in error, in compliance with the ordinance
"of the city and the permit of the board of fire
"commissioners, was proceeding to erect the gas-
"works, to the smaller and more limited section,
"was not demanded by the public welfare, and,
"taking the facts as alleged in the bill, seems
"rather to have been actuated by a purpose to
"exclude the plaintiff in error from further prose-
"cution of the enterprise. The limits of the priv-
"ileged district were fixed late in August. In Sep-
"tember the complainant began the construction
"of the works. In November, without changed
"conditions or adequate reason, the council by an
"amended ordinance drew a line embracing a part
"of the district including the complainant's prop-
"erty, and declared that, too, shall be prohibited
"territory. This action is strongly corroborative
"of the allegations of the bill that the purpose was
"not police regulation in the interest of the public
"but the destruction of the plaintiff's rights and
"the building up of another company still within
"the privileged district after the passage of the
"amendment. Being the owner of the land and
"having partially erected the works the plaintiff
"in error had acquired property rights and was
"entitled to protection against unconstitutional
"encroachments which would have the effect to
"deprive her of her property without due process
"of law."

It is true, in the last case, this court was dealing with the exercise by the State of its police power; but, as we have already suggested, this power is certainly as broad as, and, we submit, broader than, the power of Congress to regulate commerce.

In Interstate Commerce Commission *vs.* Brimson, 154 U. S., 447, it was held:—

"Power given to Congress to regulate interstate
"commerce does not carry with it authority to

"destroy or impair those fundamental guarantees "of personal rights that are recognized by the "Constitution as inhering in the freedom of the "citizen."

In *ex parte* Jackson, 96 U. S., 727, it was held:—

"Letters, and sealed packages subject to letter "postage, in the mail can be opened and examined "only under like warrant, issued upon similar oath "or affirmation, particularly describing the thing "to be seized, as is required when papers are sub- "jected to search in one's own household. The "constitutional guaranty of the right of the people "to be secure in their papers against unreasonable "searches and seizures extends to their papers, "thus closed against inspection, wherever they "may be.

"Regulations against transporting in the mail "printed matter, which is open to examination "cannot be enforced so as to interfere in any man- "ner with the freedom of the press. Liberty of "circulating is essential to that freedom. When "therefore, printed matter is excluded from the "mail, its transportation in any other way as "merchandise cannot be forbidden by Congress."

The court said (page 735):—

"But it is evident that they were founded upon "the assumption that it was competent for Con- "gress to prohibit the transportation of news- "papers and pamphlets over postal-routes in any "other way than by mail; and of course it would "follow, that if, with such a prohibition, the trans- "portation in the mail could also be forbidden, "the circulation of the documents would be de- "stroyed, and a fatal blow given to the freedom "of the press. But we do not think that Congress "possesses the power to prevent the transpor- "tation in other ways, as merchandise, of matter "which it excludes from the mails. To give ef- "ficiency to its regulations and prevent rival postal "systems, it may perhaps prohibit the carriage

"by others for hire, over postal routes, of articles
"which legitimately constitute mail matter, in
"the sense in which those terms were used when
"the Constitution was adopted, consisting of letters,
"and of newspapers and pamphlets, when not sent
"as merchandise; but further than this its power
"of prohibition cannot extend."

In Chicago Railway Co. *vs.* Minnesota, 134 U. S., 418, 455, it was said, quoting from the opinion in Stone *vs.* Farmers Loan & Trust Co., 116 U. S., 307, 331:—

"'From what has thus been said, it is not to be
"'inferred that this power of limitation or regula-
"'tion is itself without limit. This power to regu-
"'late is not a power to destroy, and limitation is not
"'the equivalent of confiscation. Under pretense
"'of regulating fares and freights, the State cannot
"'require a railroad corporation to carry persons
"'or property without reward; neither can it do
"'that which in law amounts to a taking of private
"'property for public use without just compensa-
"'tion, or without due process of law.'"

We have been unable to find any decision by this court, holding that a transportation, conducted in accordance with rules prescribed for the regulation of commerce, of an article not harmful, but, on the contrary, constituting a necessity of life, can be prohibited, because of the power to regulate.

The Attorney General referred, in his oral argument in the court below, to Union Bridge Co. *vs.* United States, 204 U. S., 364, in which it was held that it was within the power of Congress, without affording compensation, to cause a bridge to be removed which obstructed navigation. In that case, however, what was held, was what had practically always been held, *i. e.*, that the power to regulate commerce includes the power to remove all obstructions to the navigation of navigable rivers. Any other holding would permit an individual to encroach upon a public highway (a navigable river), and obstruct

the same perpetually, unless compensated for the removal of such obstruction.

Whilst a bridge, constructed at a past time, which, later, encroaches upon a navigable river, might not have obstructed such navigation as, at the time of its erection, was being conducted, the person who built was bound to know that his encroachment was subject to a paramount power in Congress, at any time, to cause to be thrown open to the public, when its needs should demand, the entire highway.

There is no similitude between a power to remove an obstruction to navigation and the power to forbid the use, by a railroad company, of a highway constructed by it *inter alia* for its own purposes of transportation—a use obstructing neither a natural nor an artificial way.

In the course of the opinion in the Union Bridge case, Mr. Justice Harlan said (page 399):—

> "Unless there be a taking within the meaning of "the Constitution, no obligation arises upon the "United States to make compensation for the cost "to be incurred in making such alterations. The "damage that will accrue to the Bridge Company as "the result of compliance with the Secretary's order "must, in such case, be deemed incidental to the "exercise by the Government of its power to regulate "commerce among the States, which includes, as "we have seen, the power to secure free navigation "upon the waterways of the United States against "unreasonable obstructions. There are no circum-"stances connected with the original construction "of the bridge or with its maintenance since which "so tie the hands of the Government that it cannot "exert its full power to protect the freedom of navi-"gation against obstructions. * * *
>
> "In conformity with the adjudged cases and in "order that the constitutional power of Congress "may have full operation, we must adjudge that "Congress has power to protect navigation on all "waterways of the United States against unrea-"sonable obstructions, even those created under "the sanction of a state, and that an order to so

"alter a bridge over a waterway of the United "States that it will cease to be an unreasonable "obstruction to navigation will not amount to a "taking of private property for public use, for "which compensation need be made. * * *

"The charter of the Company, as we have seen it, "expressly warned the Company that its bridge "must not obstruct navigation—that is, in legal "effect navigation as it then was or might be at "any subsequent time."

So that, in point of fact, the bridge company in that case took nothing by its charter as against, but built subject to, the right of the United States to open the navigation of the river, when such opening should become necessary.

In the opinion delivered in the Union Bridge case, by Judge Buffington, in the court below, he said (143 Fed., 377, 388):—

"The facts are not, as they were in the case of "the Monongahela Navigation Company *vs.* United "States, 148 U. S., 312. Its bridge is not taken "and used by the government for public purposes, "as were the dams and locks of the navigation com- "pany in that case. Indeed, the right of the bridge "company to maintain a bridge and to collect tolls "thereon is not denied, much less taken, and the "effect of this proceeding is not to take or condemn "its property, but is simply to compel the company "to so use its property as not to interfere with the "right of the public to an unobstructed use of the "stream. It is simply the enforcement of the time- "honored maxim which qualifies the absolutism of "all property rights: '*Sic utere tuo ut non alienum* "'*laedas.*' 'So use your own as not to injure an- "'other's property.'"

The unreasonableness of the Commodities Clause, as a regulation, appears, when we consider that it can only be justified upon the assumption that a carrier who transports his own coal, as well as that of others, *must* discriminate.

There has never been any judicial determination that discrimination is a necessary result of duality of ownership and transportation. It may be that there is a temptation to discriminate; but the wrong-doing consists not in the temptation, but in the yielding thereto—in an actual discrimination. The machinery of courts of justice is sufficient to determine, as a matter of fact, whether the carrier does, or does not, discriminate, and to punish him for the fact. To punish because of apprehensions is akin to ancient methods of witch detection. Wrong-doing, as we have said, is a fact to be ascertained judicially, not to be assumed by Congress.

In the Act to which the Hepburn Act is a supplement, and in the Hepburn Act itself, the discrimination and favoritism which are assumed to result from duality of ownership and transportation, are specified, condemned and penalized. Ample machinery is provided to ascertain their existence. The penalties imposed are such as are more than likely to deter from their perpetration. How then can it be proper, after providing ample regulations in all the particulars necessary to secure a uniform enjoyment of the right of transportation, in the absence of any finding of violation, to deprive the carrier of its property, and the owners of coal of their right to deal with the same in commerce, because it may eventuate that the machinery for detection and punishment will prove insufficient?

It is true that in the Northern Securities case this court thought concentration of shares of competing railroad companies should be forbidden because the power to prevent competition was thereby acquired. It must be borne in mind, however, that a combination to prevent competition was of itself wrong, and that the question was not whether the railroad company should be deprived of a right because it would thereby possess a power which would enable it to do wrong, but whether it should be permitted to make an illegal combination which would enable it so to do.

Much reliance is placed by the Government upon the opinion of this court, written by Mr. Justice White, in

New Haven Ry. Co. *vs.* Interstate Commerce Commission, 200 U. S., 361. This opinion discloses, in the mind of the learned justice, the greatest aversion to duality of ownership and transportation; but the decision was rendered in a case in which the carrier, practically in violation of the law of the State in which it was located, had purchased coal for the purpose of transporting, and had transported the same in such way as discriminated against other shippers. The fact of discrimination alone was in question, and it was judicially ascertained to exist and was thereupon punished. Nowhere, in the course of the opinion, does it appear that the courts are powerless, in case of favoritism or of discrimination on the part of a railroad company, to ascertain the fact. What is there in the situation presented in the case of duality of ownership and of transportation, which renders the courts powerless to determine whether or not anything wrong has been done?

It must also be borne in mind that the learned justice was not dealing with a case in which there was a vested right to continue to trade in the article to be transported, acquired by express grant. Nowhere, in the course of the opinion, is anything said which would justify the claim of a right practically to confiscate property, such as is set up, in the present case, by the United States.

In order that we may see precisely what was said, and held, in the New Haven case, we will quote *in extenso* from the opinion, 382:—

> "Specifying the grounds of the complaint, it "was alleged that in the spring of 1903, the Chesa- "peake and Ohio made a verbal agreement with "the New Haven to sell to that road sixty thou- "sand tons of coal, to be carried from the Kanawha "district to Newport News, and thence by water "to Connecticut, for delivery to the buyer at $2.75 "per ton, and that a considerable portion had "already been delivered and the remainder was "in process of delivery. It was averred that the "price of the coal at the mines where the Chesa- "peake and Ohio bought it and the cost of trans-

"portation from Newport News to Connecticut "would aggregate $2.47 per ton, thus leaving to "the Chesapeake and Ohio only about twenty- "eight cents a ton for carrying the coal from the "Kanawha district to Newport News, whilst the "published tariff for like carriage from the same "district was $1.45 per ton. * * *

"The prayer was that the Chesapeake and Ohio "and the New Haven be made parties; that both "roads be enjoined, the one from further executing "the verbal agreement to deliver coal and the other "from seeking to enforce it; that the Chesapeake "and Ohio be enjoined from 'accepting or receiving "'any rebate, concession or discrimination in re- "'spect of the transportation of any property in "'interstate or foreign commerce carried by it,' "and be moreover, enjoined from 'doing anything "'whatever, whereby coal or any other property "'shall, by any device whatever, be transported "'* * * at a less rate than named in the tariffs "'published and filed by such carrier, as is required "'by the act to regulate commerce and acts amen- "'datory thereof or supplementary thereto, or "'whereby any other advantage may be given or "'discrimination practiced.' And that the New "Haven road 'be enjoined and restrained from "'accepting or receiving any rebate, concession "'or discrimination in respect of the transportation "'of any property in interstate or foreign com- "'merce carried by it.' * * *

"The right of the Chesapeake and Ohio to buy "and sell coal, and to impute any loss on the sale "of the coal to itself as dealer instead of to itself "as carrier, was averred. * * *

"It denied that there was any departure from "the public rates or any discrimination, asserted "that at the time the original contract was made "the price was sufficient to have enabled the Ches- "apeake and Ohio to perform the contract without "losing anything either as a seller or as a carrier, "and that if in execution of the contract a con- "dition arose where a loss was suffered by the "Chesapeake and Ohio in either capacity, it was

"caused by subsequent events which could not "affect the validity of the contract when made, "and especially denied that in any way, directly "or indirectly, had it knowingly lent itself to any "discrimination, or any taking by the Chesapeake "and Ohio of less than its published rates. * * *

"For reasons to which we shall hereafter have "occasion to advert, the court held that, con- "sidering both the original contract and the verbal "agreement of 1903, there was no violation of the "provisions of the second and sixth sections of "the act to regulate commerce, forbidding the "taking of less than the published rates. It, how- "ever, held that the contracts amounted to an "undue discrimination and a violation of the third "section of the act. * * *

"On December 3, 1896, these two roads entered "into a written contract, the one to sell and the "other to buy between July 1, 1897, and July 1, "1902, not to exceed two million gross tons of "bituminous coal to be taken from the line of the "Chesapeake and Ohio road; deliveries to be made "not exceeding four hundred thousand tons per "annum. The price agreed upon was $2.75 per "gross ton, New Haven basis, settlement to be "made monthly. The coal was to be delivered by "the seller on the line of the New Haven. The "contract is reproduced in the margin.

"The Chesapeake and Ohio, not in its own name "but through others who really although not osten- "sibly acted for it, made a contract with operators "in the New River district of West Virginia, for "the delivery to it of the coal to fulfill the contract "which had been made with the New Haven. * *

"At the time this verbal agreement was made "the contract price was, leaving out of view the "claim for damages, inadequate to pay the market "price, as admitted by the pleadings, of the coal "plus the published rates of the Chesapeake and "Ohio to Newport News, and the charges thence "to the point of delivery. To put itself in a po- "sition to carry out the agreement an individual "who represented the Chesapeake and Ohio made

"contracts in his own name with operators in the "Kanawha district to furnish the desired coal. "Without stopping to state the particular methods "of accounting by which the result was accom- "plished, it is indisputable that the Chesapeake "and Ohio bore the loss arising from the difference "between the contract price, the price of the coal "at the mines, the published rate to Newport "News, and the cost of transporting thence to "the point of delivery.

"Undoubtedly long prior to the making of the "first contract the Chesapeake and Ohio, besides "its business as a carrier, bought and sold coal. "This business was carried on by the company "from about 1874 up to the time of the making "of the contract of 1896, as testified by the presi- "dent who made that contract, as follows:

"'The coal was handled by a separate and dis- "'tinct department of the railway company, the "'mine operators delivering for an agreed price "'at the mines to the coal agent of the railway "'company all coal mined by them, the net result "'realized from the selling price of the coal repre- "'senting the freight earned by the railway com- "'pany.'

"And the same official testified that he made "the contract of 1896 as a continuation of this "system.

"In 1895, however, the State of West Virginia "passed 'An act to prevent railroad companies "'from buying and selling coal or coke and to "'prevent discrimination.' The first section of "this act made it unlawful for any railroad cor- "poration to engage directly or indirectly in the "business of buying and selling coal or coke. In "consequence of this act, prior to the making of "the contract of 1896, the coal department of the "railroad was abolished. And it was the existence "of the West Virginia statute which caused the "Chesapeake and Ohio, when it contracted with "operators in West Virginia to procure as to both "contracts the coal for delivery to the New Haven "to do so not in its own name but through an- "other. * * *

"We must determine a question of fact as to "which there is some dispute; that is, was the "price at which the Chesapeake and Ohio con- "tracted in 1896 to sell the coal to the New Haven "sufficient to pay the cost of the coal at the mines, "as well as the expense of delivery, including the "published freight rate? Without stopping to go "into the evidence we content ourselves with "saying that we think the court below correctly "held that the price was not adequate to accomplish "these purposes, and that from the inception of "delivery under the contract, and during the whole "period thereof, except for a brief time, caused "by a lowering of the freight rates, the contract "price was inadequate to net the railroad its proper "legal tariff. * * *

"In approaching the consideration of the act to "regulate commerce, we for a moment put out of "view the provisions of the West Virginia statute "and its influence upon the validity of the contract "made in West Virginia for the purpose of ac- "quiring the coal which the Chesapeake and Ohio "had obligated itself to deliver. We shall also "assume for the purpose of the inquiry that the "Chesapeake and Ohio, although not expressly "authorized, was not prohibited by its Virginia "charter from buying and selling and transporting "the coal in which it dealt. The case, therefore, "will be considered solely in the light of the oper- "ation and effect of the provisions of the act to "regulate commerce, and we shall not direct our "attention to expressly determining whether the "assertion by a carrier of a right to deal in the "products which it transports would not be so "repugnant to the general duty resting on the "carrier as to cause the exertion of the power to "deal in the products which it transports to be "unlawful, irrespective of statutory restrictions.

"The question, therefore, to be decided is this: "Has a carrier engaged in interstate commerce "the power to contract to sell and transport in "completion of the contract the commodity sold, "when the price stipulated in the contract does "not pay the cost of purchase, the cost of delivery "and the published freight rates? * * *

"It cannot be challenged that the great purpose "of the act to regulate commerce, whilst seeking "to prevent unjust and unreasonable rates was to "secure equality of rates as to all and to destroy "favoritism, these last being accomplished by "requiring the publication of tariffs and by pro- "hibiting secret departures from such tariffs, and "forbidding rebates, preferences and all other "forms of undue discrimination. To this extent "and for these purposes the statute was remedial "and is, therefore, entitled to receive that inter- "pretation which reasonably accomplishes the great "public purpose which it was enacted to subserve. "That a carrier engaged in interstate commerce "becomes subject as to such commerce to the "commands of the statute, and may not set its "provisions at naught whatever otherwise may "be its power when carrying on commerce not "interstate in character, cannot in reason be de- "nied. Now, in view of the positive command "of the second section of the act, that no departure "from the published rate shall be made, 'directly "or indirectly,' how can it in reason be held that "a carrier may take itself from out the statute in "every case by simply electing to be a dealer and "transport a commodity in that character? * * *

"The all-embracing prohibition against either "directly or indirectly charging less than the "published rates shows that the purpose of the "statute was to make the prohibition applicable "to every method of dealing by a carrier by which "the forbidden result could be brought about. "If the public purpose which the statute was "intended to accomplish be borne in mind, its "meaning becomes, if possible, clearer. What was "that purpose? It was to compel the carrier as "a public agent to give equal treatment to all. "Now if by the mere fact of purchasing and selling "merchandise to be transported a carrier is en- "dowed with the power of disregarding the pub- "lished rate, it becomes apparent that the carrier "possesses the right to treat the owners of like "commodities by entirely different rules. That

"is to say, the existence of such a power in its "essence would enable a carrier, if it chose to do "so, to select the favored persons from whom he "would buy and the favored persons to whom he "would sell, thus giving such persons an advantage "over every other, and leading to a monopolization "in the hands of such persons of all the products "as to which the carrier chose to deal. Indeed "the inevitable result of the possession of such "a right by a carrier would be to enable it, if it "chose to exercise the power, to concentrate in "its own hands the products which were held for "shipment along its line, and to make it, therefore, "the sole purchaser thereof and the sole seller at "the place where the products were to be marketed; "in other words, to create an absolute monopoly. "To illustrate: If a carrier may by becoming a "dealer buy property for transportation to a market "and eliminate the cost of transportation to such "market, a faculty possessed by no other owner "of the commodity, it must result that the carrier "would be in a position where no other person "could ship the commodity on equal terms with "the carrier in its capacity of dealer. * * * "For here it is unquestioned that the Chesapeake "and Ohio, as a result of its being a dealer, had "become, long prior to the adoption of the Inter-"state Commerce Law and continued to be there-"after, up to the passage of the West Virginia "statute prohibiting a carrier from dealing in coal, "virtually the sole purchaser and seller of all the "coal produced along the line of its road. * * *

"And the considerations previously stated serve "also to demonstrate that the prohibitions of the "act to regulate commerce concerning 'undue or "'unreasonable preference or advantage,' 'undue "'or unreasonable prejudice or disadvantage' and "'unjust discrimination' are in conflict with the "asserted right of a carrier to become a dealer in "commodities which it transports, and as such "dealer to sell at a price less than the cost and the "published rates. * * *

"As we have seen, the president of the Chesa-

"peake and Ohio, by whom the corporation was "represented in making the contract, expressly "testified that from the beginning that corporation "had pursued the policy of acquiring all the coal "mined on its line and sold it, relying upon the "net result of such sales for its freight compen- "sation, and that the particular contract was made "in continuation of that policy. * * * Indeed, "the proof leaves no doubt upon our minds that, "in making the contract, the Chesapeake and Ohio "sought to accomplish results which it deemed "beneficial by means which it considered effectual, "even although resort to such means was pro- "hibited by the Interstate Commerce Act. In "other words, we think it is established beyond "doubt that, desiring to stimulate the production "of coal along its line and thereby, as it conceived, "to increase the carriage of that commodity and "to benefit the railroad and those living along "its line by the reflex prosperity which it was "deemed would arise from giving a stimulus to "an industry tributary to the railroad, the Chesa- "peake and Ohio bought and sold the coal with- "out reference to whether the net result to it would "realize its published rates. * * *

"Further, as the prohibition of the Interstate "Commerce Act is ever operative, even if the facts "established that at the particular time the con- "tract was made, considering the then cost of coal "and other proper items, the net published tariff "of rates would have been realized by the Chesa- "peake and Ohio from the contract, which is not "the case, it is apparent that the deliveries under "the contract came under the prohibition of the "statute whenever for any cause, such as the en- "hanced cost of the coal at the mines, an increase "in the cost of the ocean carriage, etc., the gross "sum realized was not sufficient to net the Chesa- "peake and Ohio its published tariff of rates. "* * * We say this because we think it ob- "vious that such prohibitions would be rendered "wholly ineffective by deciding that a carrier may "avoid those prohibitions by making a contract

"for the sale of a commodity stipulating for the "payment of a fixed price in the future, and thereby "acquiring the power during the life of the con- "tract to continue to execute it, although a viola- "tion of the act to regulate commerce might arise "from doing so. * * *

"Because no express prohibition against a carrier "who engages in interstate commerce becoming a "dealer in commodities moving in such commerce "is found in the act, it does not follow that the "provisions which are expressed in that act should "not be applied and be given their lawful effect. "Even, therefore, if the result of applying the pro- "hibitions as we have interpreted them will be "practically to render it difficult, if not impossible, "for a carrier to deal in commodities, this affords "no ground for relieving us of the plain duty of "enforcing the provisions of the statute as they "exist. This conclusion follows, since the power "of Congress to subject every carrier engaging in "interstate commerce to the regulations which it "has adopted is undoubted. * * *"

"It was shown in both cases that the carriers "prior to the adoption of the Interstate Commerce "Act were authorized by their charters or legis- "lative authority to carry on both the business "of mining and selling the coal so mined and trans- "porting the same to market. Indeed it was "found in both cases that the functions of pro- "ducing and transporting, as authorized, were "so interblended that it was impossible to separate "one from the other. Whilst it is true that in "both of the cases it was also shown that the car- "riers bought, sold and transported some coal "which was not produced in the mines which they "owned, this fact was evidently treated in view "of the other circumstances of the case as of minor "importance, since the commingled powers of pro- "ducing, selling and transporting were alone made "the basis of the conclusion reached by the Com- "mission as to the character of relief which could "be afforded. Solely in view of the lawful power "of the carriers to mine, sell and transport existing

"before the passage of the act to regulate commerce "the Commission decided that its authority, under "that statute and under the circumstances of the "case, was confined to compelling the exaction of "rates which were just and reasonable. The fact "that the rulings in the two cases just referred to "were solely placed upon the peculiar powers of "the defendant corporations possessed by them "prior to the passage of the Interstate Commerce "Act was pointed out by the Commission in Grain "Rates of Chicago Great Western Ry. Co., 7 Inters. "Com. Rep. 33. * * *

"The Haddock and Coxe cases, said (p. 38):

"'Those cases are in no respect similar to this. "'In both the common carrier was also the owner "'of extensive coal fields, and indeed it had be- "'come a common carrier largely for the purpose "'of transporting the product of those mines to "'market. This state of things existed before the "'passage of the act, and had no reference to the "'act. Unless the carrier was permitted to trans- "'port its coal, the result would be in effect the "'confiscation of its property, and to order it to "'charge itself with a particular rate would merely "'result in a matter of bookkeeping. Under these "'circumstances it was held that the only remedy "'was to enquire whether the rate charged the "'complainant was a reasonable one.'

"Now, without at all intimating that as an "original question we would concur in the view "expressed in the case last cited that to have ap- "plied the act to regulate commerce, under proper "rules and regulations for the segregation of the "business of producing, selling and transporting "as presented in the Haddock and Coxe cases, "would have been confiscatory, and without re- "viewing the rulings made by the Interstate Com- "merce Commission in those cases and adhered "to by that body during the many years which "have followed those decisions, we concede that "the interpretation given by the Commission in "those cases to the act to regulate commerce is "now binding, and as restricted to the precise

"conditions which were passed on in the cases "referred to, must be applied to all strictly identical "cases in the future, at least until Congress has "legislated on the subject."

When Mr. Justice White spoke of "segregation," it was of such segregation of the business of producing, of selling and of transporting, as would apply to each branch of the business, the Act to regulate commerce, without permitting one to cover something improper in the other.

It is obvious that what was said in England, is inapplicable here, inasmuch as, there, the carriers come into existence under Act of Parliament, their powers being derived therefrom. The body which grants the power, can put upon such grant, conditions. If, therefore, in England, the Parliament was of the opinion that duality of ownership and transportation was contrary to public policy, it had an unlimited power so to declare and to enforce the declaration by prohibition. It could say, as a condition of corporate birth, that the carrier should engage in no other business. Necessarily, if, after it had thus said, the carrier, in violation of the declaration, acquired property, it could be forbidden to transport the same. Such forbidding was a proper punishment, for deliberate violation of a valid law.

In our case, however, it is not within the power of Congress to limit the charter rights of railroad corporations. The State may confer upon them whatever powers it may see fit. It may forbid them from engaging in any other business; or, being of the opinion that it is necessary to permit them to invest their capital in the development of the mineral wealth of the Commonwealth for the public benefit, it may permit such investment. The policy to be considered is the policy of the State of Pennsylvania, as the same existed when the powers were granted and contractual rights arose. What was by the State permitted can be availed of, without subjecting the defendants in error to the charge of wrong doing.

We concede that the State cannot, by its legislation, control, in any way, the conduct of interstate commerce by

a carrier by it created; but, when Congress undertakes to deal with such carrier, it must recognize a situation which has legally resulted from the exercise of State power. It must recognize the fact, that the carrier is the owner of the coal by legal grant and is entitled to whatever rights of commerce in, and with, its property are vested in a citizen.

We cannot too often call attention to the fact that *quâ* the owner of the coal, there is a prohibition, though his title is perfect, none the less perfect because acquired from a railroad company, against the exercise of his right; and this although he has nothing whatever to do with conducting the interstate transportation and depends upon an entirely independent corporation, *i. e.*, the vendor railroad company, for its carriage.

In this connection it may not be amiss to quote from Schollenberger *vs.* Pennsylvania, 171 U. S., 1, 14:—

> "We do not think the fact that the article is "subject to be adulterated by dishonest persons, "in the course of its manufacture with other sub- "stances, which it is claimed may in some instances "become deleterious to health, creates the right in "any State through its legislature to forbid the "introduction of the unadulterated article into the "State. The fact that the article is liable to adul- "teration in the course of manufacture, and that the "articles with which it may be mixed may possibly "and under some circumstances be deleterious to the "health of those who consume it, is known to us by "means of various references to the subject in books "and encyclopædias, but there is no affirmative "evidence offered on the trial to prove the fact. "From these sources of information it may be "admitted that oleomargarine in the course of its "manufacture may sometimes be adulterated by "dishonest manufacturers with articles that possibly "may become injurious to health. Conceding the "fact, we yet deny the right of a State to absolutely "prohibit the introduction within its borders of an "article of commerce, which is not adulterated and "which in its pure state is healthful, simply because

"such an article in the course of its manufacture "may be adulterated by dishonest manufacturers "for purposes of fraud or illegal gains. The bad "article may be prohibited, but not the pure and "healthy one."

Were it not for the fact, that owing to the manner in which the mines are located, practically but one railroad company can carry therefrom, the Act could be rendered abortive by delivery by all the coal companies whose shares are owned by each railroad company, of their product, to another railroad company, and *vice versa*. The situation is such that the prohibition of carriage by the railroad company interested in the coal, amounts to a prohibition against any carriage, and the Act which under ordinary circumstances would be far less harmful, will perpetrate the greatest wrong.

It is sometimes said, that the power to regulate domestic and foreign commerce, conferred in the same clause, and in the same language, is equally extensive in both cases. This statement, however, ignores the fact that whilst the power to regulate is expressed in the same language, there is a difference in the thing to be regulated. There is a vast difference between domestic and foreign commerce, and in the rights of citizens to conduct one, or the other.

Foreign commerce is the intercourse between two countries, which, often, may be hostile. In determining the extent of, and limitations upon, foreign commerce, we have recourse to the law of nations. We find that one nation, for the protection of its citizens and its property, may put an embargo upon trade and fetter the intercourse. Were it otherwise, the nation itself might be destroyed, because of its inability to protect itself against the danger of unlimited intercourse. When, therefore, Congress regulates foreign commerce, it regulates something which has inherent limitations. The nation's protection may be involved in the exercise of a power, under certain circumstances, to bar all communication. There is no need, and no right, to forbid the citi-

zens of one State from transferring their possessions and their persons to another.

The theory of the Government is, that Congress may destroy the existence of several branches of commerce, and regulate what remains.

Domestic commerce is very different in its nature, scope and extent. It is the intercourse between the citizens of the different States in the transportation of persons and property from one to the other. This intercourse between citizens of the different States is an intercourse of persons, all of whom are citizens of a Union, which was largely created in order to bring about unlimited intercourse, saving only to such extent as it should be found necessary to regulate the same.

We claim that it is a fundamental right of every owner of property in one State, to sell it to citizens of another State, and to have the same, when thus sold, transported. This right cannot be forbidden by Congress. However the intercourse may be regulated, such regulation must proceed upon the concession of the inability to deprive, altogether, of the right.

If Congress may forbid commerce between the States in the sense of transactions in trade in harmless articles, it may forbid intercourse between persons. It may forbid the carrier to transport its shareholders or its directors, because it may be tempted to give them greater privileges in their carriage.

We are not, for the moment, dwelling upon the constitutional restrictions upon the exercise of the power to regulate; but upon the existence of an absolute right to commercial intercourse, which, however it may be regulated, cannot be destroyed.

In Buttfield *vs.* Stranahan, 192 U. S., 492, it is said:—

> "Whatever difference of opinion, if any, may have "existed or does exist concerning the limitations of "the power, resulting from other provisions of the "Constitution, so far as interstate commerce is con- "cerned, it is not to be doubted that from the

"beginning Congress has exercised a plenary power "in respect to the exclusion of merchandise brought "from foreign countries; not alone directly by the "enactment of embargo statutes, but indirectly as "a necessary result of provisions contained in tariff "legislation. It has also, in other than tariff legis- "lation, exerted a police power over foreign com- "merce by provisions which in and of themselves "amounted to the assertion of the right to exclude "merchandise at discretion. This is illustrated by "statutory provisions which have been in force for "more than fifty years, regulating the degree of "strength of drugs, medicines and chemicals entitled "to admission into the United States and excluding "such as did not equal the standards adopted. "9 Stat. 237; Rev. Stat. sec. 2933 *et seq.*

"The power to regulate foreign commerce is cer- "tainly as efficacious as that to regulate commerce "with the Indian tribes. And this last power was "referred to in United States *v.* 43 Gallons of "Whiskey, 93 U. S., 188, 194, as exclusive and "absolute and was declared to be 'as broad and "'as free from restrictions as that to regulate com- "'merce with foreign nations.' In that case it was "held that it was competent for Congress to extend "the prohibition against the unlicensed introduction "and sale of spirituous liquors in the Indian country "to territory in proximity to that occupied by the "Indians, thus restricting commerce with them. "We entertain no doubt that it was competent for "Congress, by statute, under the power to regulate "foreign commerce, to establish standards and pro- "vide that no right should exist to import teas "from foreign countries into the United States, "unless such teas should be equal to the standards.

"As a result of the complete power of Congress "over foreign commerce, it necessarily follows that "no individual has a vested right to trade with "foreign nations, which is so broad in character as "to limit and restrict the power of Congress to "determine what articles of merchandise may be "imported into this country and the terms upon "which a right to import may be exercised. This

"being true, it results that a statute which restrains "the introduction of particular goods into the "United States from considerations of public policy "does not violate the due process clause of the "Constitution."

The Commodities Clause forbids a carrier, which finds it necessary, to use small sizes in economically firing of its locomotives, and which, to get the same, breaks up lump coal in the ordinary course of its business, if it has on hand larger sizes as residuaries, to sell the same. A carrier may have purchased more material than was actually necessary, to enable it to make some improvement, or it may have on hand worn out rails, and second hand machinery. It cannot sell these, if the Commodities Clause is valid, to the citizens of another State, requiring the same to be delivered.

Whether this forbidding be viewed from the standpoint of unreasonableness, or from that of an exercise of a power which does not exist, it is equally indefensible.

In United States *vs.* Joint Traffic Association, 171 U. S., 505, it was held:—

"That Congress, with regard to interstate com- "merce, and in the course of regulating it in the "case of railroad corporations, has the power to "say that no contract or combination shall be "legal, which shall restrain trade and commerce, "by shutting out the operation of the general law "of competition."

This court said (page 570):—

"Although the franchise when granted by the "State becomes by the grant the property of "the grantee, yet there are some regulations respect- "ing the exercise of such grants which Congress may "make under its power to regulate commerce among "the several States. This will be conceded by all, "the only question being as to the extent of the "power.

"We think it extends at least to the prohibition "of contracts relating to interstate commerce, "which would extinguish all competition between "otherwise competing railroad corporations, and "which would in that way restrain interstate trade "or commerce. We do not think, when the grantees "of this public franchise are competing railroads "seeking the business of transportation of men and "goods from one State to another, that ordinary "freedom of contract in the use and management "of their property requires the right to combine as "one consolidated and powerful association for the "purpose of stifling competition among themselves, "and of thus keeping their rates and charges higher "than they might otherwise be under the laws of "competition. * * *

"The cases cited by the respondents' counsel in "regard to the general constitutional right of the "citizen to make contracts relating to his lawful "business are not inconsistent with the existence of "the power of Congress to prohibit contracts of the "nature involved in this case. The power to regu- "late commerce has no limitation other than those "prescribed in the Constitution. The power, how- "ever, does not carry with it the right to destroy "or impair those limitations and guarantees which "are also placed in the Constitution or in any of "the amendments to that instrument. Mononga- "hela Navigation Co. *v.* United States, 148 U. S., "312–336; Interstate Commerce Commission *v.* "Brimson, 154 U. S., 447–479.

"Among these limitations and guarantees counsel "refer to those which provide that no person shall "be deprived of life, liberty or property without "due process of law, and that private property "shall not be taken for public use without just "compensation. The latter limitation is, we think, "plainly irrelevant.

"As to the former, it is claimed that the citizen "is deprived of his liberty without due process of "law when, by a general statute, he is arbitrarily "deprived of the right to make a contract of the "nature herein involved.

"The case of Allgeyer *v.* Louisiana, 165 U. S., 578, "is cited as authority for the statement concerning "the right to contract. In speaking of the meaning "of the word 'liberty,' as used in the Fourteenth "Amendment to the Constitution, it was said in "that case to include, among other things, the "liberty of the citizen to pursue any livelihood or "vocation, and for that purpose to enter into all "contracts which might be proper, necessary and "essential to his carrying out those objects to a "successful conclusion.

"We do not impugn the correctness of that state- "ment. The citizen may have the right to make a "proper (that is, a lawful) contract, one which is "also essential and necessary for carrying out his "lawful purposes. The question which arises here "is, whether the contract is a proper or lawful one, "and we have not advanced a step towards its "solution by saying that the citizen is protected by "the Fifth, or any other amendment, in his right to "make proper contracts to enable him to carry out "his lawful purposes. We presume it will not be "contended that the court meant, in stating the "right of the citizen 'to pursue any livelihood or "'vocation,' to include every means of obtaining a "livelihood, whether it was lawful or otherwise. "Precisely how far a legislature can go in declaring "a certain means of obtaining a livelihood unlawful, "it is unnecessary here to speak of. It will be con- "ceded it has power to make some kinds of voca- "tions and some methods of obtaining a livelihood "unlawful, and in regard to those the citizen would "have no right to contract to carry them on.

"Congress may restrain individuals from making "contracts under certain circumstances and upon "certain subjects. Frisbie *v.* United States, 157 "U. S., 160."

In Lawton *vs.* Steele, 152 U. S., 133, this court said:—

"To justify the State in thus interposing its "authority in behalf of the public, it must appear, "first, that the interests of the public generally,

"as distinguished from those of a particular class, "require such interference; and, second, that the "means are reasonably necessary for the accom- "plishment of the purpose, and not unduly oppres- "sive upon individuals. The legislature may not, "under the guise of protecting the public interests, "arbitrarily interfere with private business, or "impose unusual and unnecessary restrictions upon "lawful occupations. In other words, its deter- "mination as to what is a proper exercise of its "police powers is not final or conclusive, but is "subject to the supervision of the courts."

Again, in this connection, we repeat what was said in Union Bridge Co. *vs.* United States, 204 U. S., 364, 397, in these words:—

"If the means employed have no real substantial "relation to public objects which government may "legally accomplish; *if they are arbitrary and un- "reasonable, beyond the necessities of the case*, the "judiciary will disregard mere forms, and interfere "for the protection of rights injuriously affected "by such illegal action. The authority of the "courts to interfere in such cases is beyond all "doubt."

The railroad company, under the laws of the State of Pennsylvania, is *compelled* to conduct the business of transportation within that State. If deprived of the right to use its own highway, for the transportation into other States, of coal by it owned, or of coal belonging to companies in whose shares it is interested, it will be deprived of freights to such extent as will prevent it from doing business except at a loss and will render valueless its property. Can such a regulation be held to be other than invalid, because of its unreasonableness? Capital punishment should be inflicted in but few cases; and in none, until there has been a judicial determination of guilt.

Railroad companies, whose railways, in connection with each other, are the highways for interstate commerce,

are severally brought into existence by the legislation of the different States in which they are located.

These highways, in the respective States, belong to each company, subject to its obligation, within each State, to perform its duties as prescribed by its charter and by State legislation.

There is something repugnant to a sense of justice in the suggestion that the corporations which construct these highways in subordination to law, though they obey the law of the States of their creation in every respect, can be forbidden to use the same for the transportation of their own commodities, and can be compelled to use them, only in the transportation of the commodities of others.

We own highways constructed, ready for transportation of commodities from State to State. Conceding that such transportation can be regulated by Congress, we deny it can be forbidden because of a situation not within the power of Congress to condemn as wrong, or even to prohibit, *i. e.*, duality of ownership and transportation.

By the Act of Congress of June 15th, 1866 (14 Statutes at Large, 66), it was enacted as follows:—

> "Whereas, the Constitution of the United States "confers on Congress in express terms the power "to regulate commerce among the several states, "to establish post roads, and to raise and support "armies, therefore,
>
> "Be it enacted, That every Railroad Company "in the United States whose road is operated by "steam, its successors and assigns, be and is hereby "authorized to carry upon and over its road, boats, "bridges and ferries, all passengers, troops, govern- "ment supplies, mails, freight and property, on "their way from any state to another state, and "to receive compensation therefor, and to connect "with roads of other states so as to form contin- "uous lines for the transportation of the same, to "the place of destination."

In Railroad Company *vs.* Richmond, 19 Wall., 584, it was held:—

"The act of Congress of June 15th, 1866, authorizing every railroad company in the United States, whose road was operated by steam, and its successors and assigns, to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property, on their way from one State to another State, and to receive compensation therefor, and to connect with roads of other States so far as to form continuous lines for the transportation of the same to their place of destination; and the act of July 25th, 1866, authorizing the construction of certain bridges over the Mississippi River, and among others a bridge connecting Dubuque with Dunleith, in the State of Illinois, and providing that the bridges, when constructed, should be free for the crossing of all trains of railroads terminating on either side of the river, for reasonable compensation, were designed to remove trammels upon transportation between different States, interposed by State enactments or by existing laws of Congress, and were not intended to interfere with private contracts and annul such as had been made on the basis of existing legislation and existing means of interstate communication. * * *

"The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation; it was not intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse."

This court said (page 590):—

"When counsel speaks of the public policy established by the acts of Congress mentioned, he must mean nothing more than that the acts

"were intended to facilitate commercial inter-
"course among the States. Undoubtedly such was
"the case, and it is of great public interest that
"such intercourse should be free and untrammelled.
"But if comparisons may be made with respect to
"a subject of this nature, we should say that the
"observance of good faith between parties, and
"the upholding of private contracts, and enforcing
"their obligations, are matters of higher moment
"and importance to the public welfare, and more
"far reaching in their consequences."

Since 1866, railroad companies have been permitted, by express enactment of Congress, to carry over their respective roads, "freight and property on their way "from one State to another and to receive compensation "therefor." During all that time there was no public policy enacted, or found necessary, forbidding duality of ownership and transportation. Wherein lies the justification, in the year 1906, to conjure into existence, for the purpose of prohibiting a transportation permitted for nearly half a century, a public policy so long dormant—one directly contrary to that under which the highways were created and the transportation rendered possible, and destructive of the purpose for which they were constructed ?

If public policy is opposed to duality of transportation and ownership in the case of a railroad company, why is it not equally opposed to such duality in the case of all other kinds of common carriers?

It does not appear, by aught said in the Commodities Clause itself, that Congress forbade the exercise by the carrier of its charter right to transport, and of its charter, or statutory, right to trade, because of any public policy. It would rather appear that it objected to a railroad company engaging in any other business, and sought to prevent its thus engaging therein by depriving it of any opportunity to derive benefit therefrom by forbidding the transportation of the results of such business. Upon no other theory could it have acted, in forbidding the

railroad company to transport goods in which its interest had ceased, having sold the same after they had been mined or manufactured by it.

As we have already shown, by reference to decided cases, a corporation, *quâ* the subject under discussion, stands precisely as an individual, to such extent as it has a corporate right to do what may be done by an individual. The doctrine contended for by the United States, would justify the forbidding any individual, engaged in carrying goods by wagon from one State to another, from such carriage of his own goods.

It would justify Congress in compelling any such person to carry the goods of others, although his vehicles were built solely for the purpose of his own business.

The United States, through the Attorney General, contends that Congress may declare it contrary to public policy for an interstate commerce carrier to carry its own goods over its own railroad; and that such declaration is an exercise of the power to "regulate" and is valid.

We will endeavor later to show that if such an enactment be within the grant of a power to regulate, the exercise of such power is subordinate to certain constitutional guards; but, at the present time, we are considering merely the question, whether a right to do what is suggested, is to be found in the grant of power merely to "regulate."

Congress, as we have already said, deals with railroad companies, which have constructed their highways in, and which are operating the same within, the several States.

All that is within its power is, the regulation of the transportation over these highways from one State to another. The transportation, over its whole length, is conducted in States which favor a policy different from the public policy asserted by Congress to exist.

We submit that in dealing with the transportation over the railroad highways, Congress must deal with the matter only to such extent as the transportation being from State to State, is subject to its regulation. A Pennsylvania corporation may transport coal to a point near

the New Jersey line. A New Jersey corporation may transport from a point within its boundary line to another point within its boundaries in the North East. A third carrier may connect the two railroads. The Pennsylvania corporation cannot be compelled to carry outside the State. Neither can the New Jersey corporation be so compelled. Neither can be forbidden to own coal lands in its own State. Why should the continuous transportation subject either to the destruction of its property?

It has no right, concerning such transportation, to declare a policy which destroys property validly owned and used, under the State policy. It deals with the transportation; not with any policy regulating the moral quality or situation, of the transporter. More than this, there being, in the owner of the goods, the right to sell the same, deliverable in other States, and to have the same transported into those States in performance of its contract of sale, it has no right to forbid the exercise by the owner of his right, merely because the transportation must be conducted by a carrier whose situation of duality it does not like.

An anomalous result follows the prohibition. The owner of the coal, who has constructed a highway, in order that it may be transported, is compelled to turn over the use of such highway, exclusively, to "independent" coal owners, who contributed nothing towards its construction, with the result that the corporation which built the highway finds the value of the commodity it owns destroyed and the use of its highway for transportation at a reasonable profit, rendered impossible.

What public policy should prevail? The policy of the State of Pennsylvania, whose mineral wealth needing to be developed, by means of what it promised in the way of legislation, induced its corporations to develop such wealth, or, a so-called public policy of the United States, which renders abortive all that was done by, and within, the State, because of an assumption that other shippers thereby may be injured? To the fullest extent we con-

cede that the carrier, notwithstanding its situation, under the laws of the States, may not indulge in favoritism or discrimination, or charge unreasonable rates; but we contend that it cannot be condemned, for no reason other than a situation of affairs legally existing when it put itself into a condition to transport. From the moment of commencing the transportation, it is under Federal regulation; but it cannot be forbidden to commence because of its existing situation.

The inevitable result of permitting prohibition of transportation under the guise of public policy would be, that no State could safely develop its wealth by encouraging legislation hereafter, because it can not be known by the persons sought to be induced to make such development, what treatment they may receive from the United States.

The real question must be, whether or not the carrier, in fact, does injure other shippers, because of a temptation to favor itself. This, we submit, is a question of fact. If it exists, it can be ascertained. If found to exist, it can be punished. If it does not exist, the rights of the carrier, properly existing under State legislation, ought not to be destroyed.

In entire accordance with the provisions of the Act of Congress of 1866, railroad companies have been transporting coal, in interstate commerce, for nearly half a century. The expenditures which have been made by them, in order that such business may be conducted, have amounted to hundreds of millions of dollars. Under the power to regulate commerce, it is claimed Congress, at any moment, may render utterly valueless all the property resulting from these expenditures—that it can do this, although the carrier has violated no duty, saving the offense it gives Congress by a duality of ownership and transportation, legally existing.

No such confiscation of property has ever been heretofore attempted. It rests upon a construction of a power to regulate, which converts it into a power to destroy. Congress has a right to say to every carrier

engaged in interstate commerce: "You shall not dis-"criminate between shippers." It may subject those who engage in such commerce to supervision and investigation, in order that it may ascertain whether there is such discrimination. We submit, however, with great confidence, that it may not say to these carriers: "We "do not know whether you discriminate or not; but it "will be possible for you to do so, if you are interested "in transportation of commodities over your own lines, "and as it will be difficult to determine whether you "do or do not, we will forbid you thus to transport."

The only duty which rests upon the railroad company to carry, is that which results from its charter, and from the enactments of the State in which it is chartered. There is no duty incumbent upon it to transport beyond the State. The only right, we submit, which vests in Congress is to say, if it thus transports beyond the State, that it shall do so in such a way as will do equal justice to everybody interested in such transportation.

Under this head we are quite willing to refer to the full quotation we have heretofore made from the language of Mr. Justice Peckham in the Addyston Pipe and Steel Company case.

In Atlantic Coast Line R. R. Co. *vs.* North Carolina Corporation Commission, 206 U. S., 1, 20, it was said:—

> "As the public power to regulate railways and "the private right of ownership of such property "co-exist and do not the one destroy the other, "it has been settled that the right of ownership "of railway property like other property rights "finds protection in constitutional guarantees, and, "therefore, whenever the power of regulation is "exerted in such an arbitrary and unreasonable "way as to cause it to be in effect not a regulation, "but an infringement upon the right of owner-"ship, such an exertion of power is void because "repugnant to the due process and equal protection "clauses of the Fourteenth Amendment. The re-"sult, therefore, is that the proposition relied upon 'is well founded if it be that the order which the

"court below enforced was of the arbitrary and "unreasonable character asserted.

"In coming to consider the question just stated "it must be borne in mind that a court may not, "under the guise of protecting private property, "extend its authority to a subject of regulation "not within its competency, but is confined to "ascertaining whether the particular assertion of "the legislative power to regulate has been exer- "cised to so unwarranted a degree as in substance "and effect to exceed regulation, and be equivalent "to a taking of property without due process of "law, or a denial of the equal protection of the "laws."

V. The Commodities Clause is unconstitutional because it was intended to violate, and does actually violate, a right reserved to the States.

In the State Governments alone, to the exclusion of the United States, is vested the right to declare what property may, and what may not, be held by its citizens, within its limits, and the manner in which title thereto may be acquired. Any Federal Statute which has for its purpose the destruction of title to property or of the enjoyment of property, title to which is vested by the law of the State in a third person, trenches upon the reserved right thus expressed in the Constitution of the United States by Article X of the Amendments:—

"Powers not delegated to the United States by "the Constitution, nor prohibited by it to the "States are reserved to the States respectively, "or to the people."

In United States *vs.* Fox, 94 U. S., 315, there was a devise to the United States of real estate situated in the State of New York. By the laws of that State, a devise of lands therein could only be made to natural persons or to such corporations as were created under its laws and were authorized to take by devise. It was held that the United States took no title.

It is impossible to read the Commodities Clause without reaching a conclusion that what was intended by Congress was, to prevent the mining of coal by railroad corporations, or their engaging in any way in such business. We say the mining of coal, because we are dealing with that special subject. The general intent was to prevent a railroad company from engaging in mining, manufacturing or producing, any commodity.

We cannot fail to reach this conclusion, in view of the fact that railroad companies are forbidden to transport any article manufactured, mined or produced by them, whether they are, or are not, the owners thereof, or interested therein at the time of transportation. The only intelligent construction of the statute is that which holds it was intended to prevent the conducting of such other business.

It is hardly necessary to do more than state the fact that the State alone can determine whether its corporations may, or may not, engage in other business. Practically, to deprive third persons of their property, by denying them transportation which is a necessary pre-requisite to its valuable use, because a railroad company mines, manufactures or produces, is to put a penalty upon the acquisition and enjoyment of property in a State, under the laws and protection of that State.

In like manner, to deny to coal companies, permitted, even though their shares be held by railroad companies, to mine and own coal, the right to make use of the coal in the only way in which such use can be valuable, is to deny them, though they have committed no wrong, a right guaranteed by the State which alone has control thereof.

Had the Commodities Clause enacted that no corporation of any State, possessed of title to a "*rem*," should transport the same in interstate commerce, although authorized under the laws of the State to own or enjoy such "*rem*," would it be hard to maintain that the enactment was invalid, because destructive of State rights, in a matter over which the United States has no control? It

must be conceded, we submit, that it is not competent for Congress to say that a railroad company shall not mine coal in the State of Pennsylvania. The statute we are considering is not expressed in the language suggested, but such is its obvious intent.

Because Congress entertains a different view of the policy of duality of ownership and of transportation, it says that any corporation authorized to exercise such duality by the law of the State which is supreme in the matter, shall exercise it under penalties amounting almost to confiscation.

To say that any purchaser of coal in Pennsylvania, possessed under the laws of that State, of a valid title thereto, shall, for any cause over which he has no control, lose his right of property therein, by a denial to him of the right to transport into another State, is, practically, to annul and override, Pennsylvania legislation.

VI. The Commodities Clause is unconstitutional because, in violation of constitutional restrictions upon the exercise of the right to regulate commerce, it deprives of "liberty and property."

The clause of the Constitution which is violated by the Commodities Clause is Article V. of the Amendments, reading thus:—

> "Nor shall any person be deprived of life, liberty "or property without due process of law, nor shall "private property be taken for public use without "just compensation."

The numerous decisions arising under the Fourteenth Amendment, are applicable, in interpreting the meaning and extent of the Fifth Amendment.

In McCray *vs.* United States, 195 U. S., 27, it was said that "both the Fifth and Tenth Amendments qualify, in "so far as they are applicable, all the provisions of the "Constitution."

In Carroll *vs.* Greenwich Insurance Co. of New York, 199 U. S., 401, it was said (page 410):—

"While we need not affirm that in no instance "could a distinction be taken, ordinarily if an Act of "Congress is valid under the Fifth Amendment it "would be hard to say that a state law in like terms "was void under the Fourteenth. It is true that by "the provision in the body of the instrument Con- "gress has power to regulate commerce, and that the "act of Congress referred to in the case cited was "passed in pursuance of that power. But even if "the Fifth Amendment were read as contemporane- "ous with the original Constitution, the power given "in the commerce clause would not be taken to over- "ride it so far as the Fifth Amendment protects "fundamental personal rights. It is only on the "ground that the right to combine at will is a "fundamental personal right that it can be held to "be protected by the Fourteenth Amendment from "any abridgment by the State. Cincinnati Street "Ry. Co. *v.* Snell, 193 U. S., 30, 36. Many State "laws which limit the freedom of contract have "been sustained by this court, and therefore an "objection to this law on the general ground that it "limits that freedom cannot be upheld."

The decisions leave us in no doubt as to what is meant by "liberty" as used in the Fifth Amendment. It is not confined to a right of movement, free of restraint. It covers the enjoyment of property to the fullest extent of which property is capable of being enjoyed, including the right to make contracts concerning the same. Whatever interferes with the right to make legal contracts in and about property, amounts to a deprivation of "liberty."

The power possessed by Congress, under the grant to it of the right "to regulate commerce" must be so exercised as not to destroy the right to dispose of property, or to make legal contracts concerning the use, or transportation, thereof.

To forbid a coal company to sell its coal to the citizens of another State, or to cause the same to be transported into such State, is to deprive it of its "liberty," because of the deprivation of the power to use its property, in accordance with its legal right.

In like manner, to deny to the part owner of coal, such right, because a railroad company also owns a portion thereof; or to make valueless, in the hands of minority, or majority, shareholders, the shares of stock of a coal company, by forbidding its coal to be transported; or to forbid the transportation of coal in the only way in which it can be transported into another State, by an owner, because of the fact that he derived title thereto from a railroad corporation, would be to deprive him of "liberty" in the sense in which the word is used in the Fifth Amendment.

The result of holding legal, the Commodities Clause, would be to take away from railroad corporations the right to use their highways, in interstate transportation; to render valueless coal lands by them owned; to destroy the utility and value of sidings, branches and terminals; to subject them, where they are the owners of coal lands, to the duty to pay royalties, although coal cannot be mined; and to render valueless, in each year, upwards of 45,000,000 tons of coal.

It would be difficult to find a case in which there could be a deprivation of "liberty" to a greater extent.

In Butchers' Union Co. *vs.* Cresson City Co., 111 U. S., 746, Mr. Justice Bradley said, page 762:—

> "The right to follow any of the common occupa-
> "tions of life is an inalienable right. It was formu-
> "lated as such under the phrase 'pursuit of happi-
> "'ness' in the Declaration of Independence, which
> "commenced with the fundamental proposition that
> "'all men are created equal, that they are endowed
> "'by their Creator with certain inalienable rights;
> "'that among these are life, liberty and the pursuit
> "'of happiness.' This right is a large ingredient in
> "the civil liberty of the citizen. * * * I hold
> "that the liberty of pursuit—the right to follow
> "any of the ordinary callings of life—is one of the
> "privileges of a citizen of the United States. * * *
> "But if it does not abridge the privileges and im-
> "munities of a citizen of the United States to pro-
> "hibit him from pursuing his chosen calling, and

"giving to others the exclusive right of pursuing it,
"it certainly does deprive him (to a certain extent)
"of his liberty; for it takes from him the freedom
"of adopting and following the pursuit which he
"prefers; which, as already intimated, is a material
"part of the liberty of the citizen."

In Powell *vs.* Pennsylvania, 127 U. S., 678, Mr. Justice Harlan said:—

"The main proposition advanced by the defendant
"is that his enjoyment upon terms of equality with
"all others in similar circumstances of the privilege
"of pursuing an ordinary calling or trade, and of
"acquiring, holding and selling property, is an essen-
"tial part of his rights of liberty and property, as
"guaranteed by the Fourteenth Amendment. The
"court assents to this general proposition as em-
"bodying a sound principle of constitutional law."

In Monongahela Navigation Co. *vs.* United States, 148 U. S., 336, it was said:—

"It cannot be doubted, in view of the long list
"of authorities,—for many more might be cited,—
"that Congress has the power in its discretion to
"compel the removal of this lock and dam as ob-
"structions to the navigation of the river, or to
"condemn and take them for the purpose of pro-
"moting its navigability. In other words, it is
"within the competency of Congress to make such
"provision respecting the improvement of the
"Monongahela River as in its judgment the public
"interests demand. Its dominion is supreme.

"But like the other powers granted to Congress
"by the Constitution, the power to regulate com-
"merce is subject to all the limitations imposed by
"such instrument, and among them is that of the
"Fifth Amendment, we have heretofore quoted.
"Congress has supreme control over the regulation
"of commerce, but if, in exercising that supreme
"control, it deems it necessary to take private
"property, then it must proceed subject to the

"limitations imposed by this Fifth Amendment, "and can take only on payment of just compensa- "tion. The power to regulate commerce is not "given in any broader terms than that to estab- "lish post-offices and post-roads; but, if Congress "wishes to take private property upon which to "build a post-office, it must either agree upon the "price with the owner, or in condemnation pay "just compensation therefor. And if that property "be improved under authority of a charter granted "by the State, with a franchise to take tolls for "the use of the improvement, in order to determine "the just compensation, such franchise must be "taken into account. Because Congress has power "to take the property, it does not follow that it "may destroy the franchise without compensation.

* * * * * *

"Much reliance is placed upon the case of Bridge "Company *v.* United States, 105 U. S., 470. But "that was a case not of the taking, but of the "destruction, of property. It is true, Mr. Chief "Justice Waite, in delivering the opinion of the "court, uses this language in reference to the power "of Congress: 'But the power of Congress in respect "'to legislation for the preservation of interstate "'commerce is just as free from state interference "'as any other subject within the sphere of its "'legislative authority. The action of Congress is "'supreme and overrides all that States may do. "'When, therefore, Congress, in a proper way, "'declares a bridge across a navigable river of the "'United States to be an unlawful structure, no "'legislation of a State can make it lawful. Those "'who act on state authority alone, necessarily "'assume all the risks of legitimate congressional "'interference.' But such affirmation of power was "not made with reference to a question like this. "The facts in that case were these: The Bridge "Company was a creature of the legislation of the "States of Ohio and Kentucky, and incorporated "to build a bridge across the Ohio River, between "Newport and Cincinnati. The state charters au- "thorized the construction of a bridge in accord-

"ance with the provisions of an act of Congress of
"July 14, 1862, or any act that Congress might
"pass on the subject. On March 3, 1869, Congress
"passed a resolution giving its assent to the con-
"struction of this bridge. This resolution contained
"this reservation: 'But Congress reserves the right
"'to withdraw the assent hereby given, in case the
"'free navigation of said river shall at any time be
"'substantially and materially obstructed by any
"'bridge to be erected under the authority of this
"'resolution, or to direct the necessary modifica-
"'tions and alterations of said bridge.' 15 Stat., 347."

In Allgeyer *vs.* Louisiana, 165 U. S., 589, it was said:—

"The liberty mentioned in that amendment means
"not only the right of the citizen to be free from the
"mere physical restraint of his person, as by incar-
"ceration, but the term is deemed to embrace the
"right of the citizen to be free in the enjoyment of
"all his faculties; to be free to use them in all law-
"ful ways; to live and work where he will, to earn
"his livelihood by any lawful calling; to pursue any
"livelihood or avocation, and for that purpose to
"enter into all contracts which may be proper,
"necessary and essential to his carrying out to
"a successful conclusion the purposes above men-
"tioned."

VII. The Commodities Clause is unconstitutional because it is in effect a taking of private property for public use without just compensation.

As we have endeavored to show, the United States cannot enforce a public policy opposed to duality of ownership and of transportation, where a different policy had been adopted by the State which left no room for a public policy only capable of being worked out by a sacrifice of the State right.

If the supposed national public policy is of sufficient importance, and if the power given to Congress is sufficient, to make it necessary to prohibit transportation in

the way the Commodities Clause prohibits it, then it was incumbent upon Congress, because of its desire to effectuate a public use, though private property should be taken, to provide due compensation.

The effect of the statute is to destroy, in the hands of part owners, of coal companies, and of vendees, in Pennsylvania, of coal bought from coal mining companies and from railroad companies, respectively, the value of such coal; the value of railroad properties; the value of coal company properties; the right of transportation; and the right to trade in interstate commerce.

It is said that no property is taken, even though the statute may operate to deprive the owner of all benefit of its ownership; and that the deprivation, if there be a deprivation, is but consequential.

Any right of property in a "*rem*," however, involves more than the mere possession of the "*rem*." Its value depends largely upon the incidental right of disposition and transportation. These rights are taken away, and the taking is the direct result of the Act.

To say to an owner who has coal, valuable only if transported, that it must remain in the place in which it was found, without right to be transported, is practically to take possession of the coal. Whether it be physically taken and removed, or whether the owner is compelled to allow it to remain, and is prevented from removing, brings about the same result—the actual deprivation of a property right.

In the Monongahela case, the franchise was not taken; but, by reason of the taking of the property upon which it attached, it was destroyed. The navigation company was held entitled to compensation.

An ownership of coal shares, involves the right to receive whatever benefit may result from the exercise of powers conferred by the law of the State which incorporated. Practically, to destroy the exercise of its franchises by the company, is to take its property as completely as though it was physically seized.

The numerous cases in which damages have been permitted to be recovered for the flooding of lands, in the

course of construction of government works, demonstrate the fact that a taking results, where an act is done, which practically deprives the owner of the use of his property. In the present case there was such deprivation.

In Mugler *vs.* Kansas, 123 U. S., 623, it was said:—

> "It is supposed by the defendants that the doc-
> "trine for which they contend is sustained by
> "Pumpelly *v.* Green Bay Co., 13 Wall., 166. But
> "in that view we do not concur. That was an
> "action for the recovery of damages for the over-
> "flowing of the plaintiff's land by water, resulting
> "from the construction of a dam across a river.
> "The defense was that the dam constituted a part
> "of the system adopted by the State for improving
> "the navigation of Fox and Wisconsin rivers; and
> "it was contended that as the damages of which
> "the plaintiff complained were only the result of
> "the improvement, under legislative sanction, of
> "a navigable stream, he was not entitled to com-
> "pensation from the State or its agents. The case
> "therefore, involved the question whether the
> "overflowing of the plaintiff's land, to such an
> "extent that it became practically unfit to be used,
> "was a taking of property, within the meaning of
> "the constitution of Wisconsin, providing that
> "'the property of no person shall be taken for
> "'public use without just compensation therefor.'
> "This court said it would be a very curious and
> "unsatisfactory result, were it held that, 'if the
> "'government refrains from the absolute conversion
> "'of real property to the uses of the public, it can
> "'destroy its value entirely, can inflict irreparable
> "'and permanent injury to any extent, can, in
> "'effect, subject it to total destruction, without
> "'making any compensation, because, in the nar-
> "'rowest sense of that word, it is not *taken* for the
> "'public use. Such a construction would pervert
> "'the constitutional provision into a restriction
> "'upon the rights of the citizen, as those rights
> "'stood at the common law, instead of the govern-
> "'ment, and make it an authority for the invasion

"'of private right under the pretext of the public
"'good, which had no warrant in the laws or prac-
"'tices of our ancestors' pp. 177, 178."

In United States *vs.* Lynah, 188 U. S., 445, it was held:—

"All private property is held subject to the
"necessities of government and the right of eminent
"domain underlies all such rights of property.

"When the United States government appropriates
"property which it does not claim as its own, it does
"so under an implied contract that it will pay the
"value of the property it so appropriates.

"When it is alleged in an action that the govern-
"ment of the United States in the exercise of its
"powers of eminent domain and regulation of com-
"merce, through officers and agents duly empowered
"thereto by acts of Congress, places dams, training
"walls and other obstructions in the Savannah
"River in such manner as to hinder its natural flow
"and to raise the water so as to overflow the land
"of plaintiff along the banks to such an extent as to
"cause a total destruction of its value, and the
"government does not deny the ownership, admits
"that the work was done by authority of Congress,
"and simply denies that the work has produced the
"alleged injury and destruction, the Circuit Court
"of the United States has jurisdiction to inquire
"whether the acts done by the officers of the United
"States under the direction of Congress have resulted
"in such an overflow and injury of the land as to
"render it absolutely valueless and, if thereby the
"property was, in contemplation of law, taken and
"appropriated by the government, to render judg-
"ment against it for the value of the property so
"taken and appropriated.

"Where the government of the United States
"by the construction of a dam, or other public
"works, so floods land belonging to an individual
"as to totally destroy its value, there is a taking
"of private property within the scope of the Fifth
"Amendment.

"The proceeding must be regarded as an actual "appropriation of the land, including the possession "and the fee and, when the amount awarded as "compensation is paid, the title, the fee and what-"ever rights may attach thereto pass to the govern-"ment which becomes henceforth the full owner.

"Notwithstanding that the work causing the "injury was done in improving the navigability "of a navigable river and by the Constitution "Congress is given full control over such improve-"ments, the injuries cannot be regarded as purely "consequential, and the government cannot ap-"propriate property without being liable to the "obligation created by the Fifth Amendment of "paying just compensation."

This court said (page 472):—

"It is true that a majority of the court held in "that case, that the destruction of access to land "abutting on a navigable river by the construction "by Congress of a pier on the submerged lands "in front of the upland, was not a taking of private "property for public uses, but only an instance "of consequential injury to the property of the "riparian owner. But the right of compensation "in case of a taking was conceded. There have "been many cases in which a distinction has been "drawn between the taking of property for public "uses and a consequential injury to such property, "by reason of some public work. In the one class "the law implies a contract, a promise to pay for "the property taken, which, if the taking was "by the general government, will uphold an action "in the Court of Claims; while in the other class "there is simply a tortious act doing injury, over "which the Court of Claims has no jurisdiction. "Thus, in Transportation Co. *v.* Chicago, 99 U. S., "635, the city, duly authorized by statute, con-"structed a tunnel along the line of LaSalle Street "and under the Chicago River. The company "claimed that it was deprived of access to its "premises by and during the construction. This

"deprivation was not permanent, but continued "only during the time necessary to complete the "tunnel, and it was held that there was no taking "of property, but only an injury, and that a tem- "porary injury thereto. In the course of the "opinion, after referring to the Pumpelly case, "*supra*, and Eaton *v.* Boston, Concord & Montreal "Railroad Company, 51 N. H., 504, we said (p. "642):

"'In those cases it was held that permanent "'flooding of private property may be regarded as "'a "taking." In those cases there was physical "'invasion of real estate of the private owner, and "'a practical ouster of his possession. But in the "'present case, there was no such invasion. No "'entry was made upon the plaintiff's lot. All "'that was done was to render for a time its use "'more inconvenient.'"

The dissenting opinion of Judge Buffington sustains, as strongly as is possible, the contention that the Commodities Clause is a valid exercise of the power of Congress to regulate interstate commerce.

It may not be amiss, before closing this argument, briefly to refer to what is said by him.

His opinion substantially asserts that the power to regulate commerce includes the right to forbid all commerce even in articles of necessity, for no other reason than that such articles belong, at the time of transportation, to the carrier, or to a coal company, some of whose shares the carrier owns, or to the carrier and some one jointly interested with it therein.

Further than this, it asserts that such power includes the right to forbid the transportation by a carrier of all articles it had once mined or produced, although its title had been conveyed away before a commencement of the transportation. It treats as immaterial, the fact that the carrier had acquired its property under, and in obedience to, the law and policy of the State in which such property was located.

The opinion asserts the doctrine, that under this power, articles may be excluded from commerce and their owner may be practically deprived of their use and value, not because such owner—a common carrier or a coal company some of whose shares it holds—has violated any regulation governing transportation; but, because, by reason of its position, it may be tempted so to do.

In other words, the power to regulate commerce is asserted to go far beyond the right to prescribe the manner in which it shall be conducted and the rules applicable thereto, and to deny carriage to such articles as are immoral or hurtful. It concedes, in effect, the right to forbid the transportation of legitimate articles of commerce, by a carrier who obeys every rule prescribed for its transportation. It practically forbids transportation, inasmuch as there can be no transportation otherwise than by the corporations forbidden to carry, of an enormous amount of necessary articles, because Congress thinks the Legislatures which created the carrier corporations, "ought not to have permitted them to engage in any other business."

Judge Buffington holds that a coal company, by reason of the fact that a majority, or even a minority, of its shares, are held by a railroad company, can be forbidden to deal with the citizens of other States, in the only articles it was organized to produce, such articles being a part of the necessaries of life.

He holds that the courts have no right to declare invalid, any legislation prohibiting commerce in harmless merchandise, and debarring the citizens of the several States from dealing with each other, wherever Congress thinks a common carrier ought not to have been permitted by the State of its creation to acquire title to such articles.

He holds it to be within the power of Congress, practically to deprive the owners of very many hundreds of millions of dollars, of lands and of the products thereof, and of all benefit from their ownership.

The power to regulate commerce is held to be paramount to the right to life, liberty and property. There is nothing in the Constitution, if this opinion prevails, which can be enforced by way of limitation upon the unrestrainable exercise of this power.

Those who deny that this power extends so far as claimed in the dissenting opinion, contend that a power to regulate commerce includes one, reasonably to determine that certain articles are so harmful that they do not belong to commerce. Under such circumstances, their exclusion from the right of transportation is a regulation of commerce by restricting commerce within the limits of what may properly be so designated.

The opponents of this unlimited right, contend that the citizens of the several States have a right to commerce, which covers intercourse of persons and property and the transportation thereof; that the power does not include power to deprive of such right; that its exercise must be subordinate to the continuance of commerce and only by way of regulation of the same, and that to forbid the interchange between the States, by the owners thereof, of necessary articles of trade, is to violate provisions of the Constitution which protect life, liberty and property and forbid the taking of property without just compensation.

It is said by Judge Buffington, concerning the Commodities Clause, that (Record in No. 562, p. 64):—

> "It does not forbid the railroad to own or operate "mines or manufactories. It does not forbid the "sale of its product or debar carriage thereof from "a State."

It is true that the Act does not forbid a railroad to "own or operate mines or manufactories;" but it makes it unlawful, *inter alia*, for any railroad company to "trans- "port" in interstate commerce "any article or commodity * * * manufactured, mined or produced by it."

There is no doubt what was intended was, to prohibit any railroad company from "owning or operating "mines or manufactories;" but, appreciating the absolute

invalidity of any Act which forbade such owning or operating, Congress made unlawful the subsequent transportation by any carrier, of any article or commodity thus manufactured, mined or produced, under its authority, knowing that if the article or commodity thus manufactured, mined or produced would not be allowed to be transported into another State, the carrier, as a matter of course, would cease to mine, manufacture or produce what could not be sold.

As we have heretofore said, there is practically but one railroad in the case of each mine, over which its product can be carried. To forbid carriage by such carrier is, therefore, to stop production, in view of the fact that the very great bulk of anthracite coal must be transported into other States to citizens of such States.

The "sale of its product" by a railroad company to any customer within the State, could not be forbidden; but by preventing carriage, for the purchaser, in interstate commerce, of coal which had been produced by such carrier, the same result would be attained. The sale of the product owned by a railroad, or by the coal companies whose shares it holds, is, in effect, precluded, by denial of the right to transport it, after sale.

The learned Judge says (Record in No. 562, p. 64):—

> "It simply puts the carrier-owner on the basis "of all other owners and shippers of commodities, "viz: transportation of its and their product by "a disinterested carrier. Its manifest purpose is "to prevent, in shipments, favor to any, and to "secure fairness to all."

The carrier-owner is not put "on the basis of all other "owners and shippers of commodities." Being the only carrier physically able to receive and transport its coal, or that of the coal companies whose shares it owns, the foreign market is closed to it, whilst other owners and shippers may there sell.

If the "manifest purpose" of the Commodities Clause "is to prevent, in shipments, favor to any, and to secure

"fairness to all," such purpose is rendered impossible of accomplishment.

If there are two mines, side by side, one owned by a private individual and the other by a railroad company, or by a coal company whose shares it holds, the individual owner will be at liberty to transport all his coal, whilst the "carrier-owner" will be unable to make such transportation over a railroad constructed and equipped by it largely for its own purposes.

Inasmuch as an Act could easily have been drafted which would have forbidden, under penalties and punishments, a carrier's favors to itself, or to coal companies in whose shares it is interested, and, inasmuch as the Act in question did, in most detailed provisions, do that very thing, it is difficult to see how it was necessary to do more than forbid favoritism. The necessity of denying to the carrier all right to transport is not "manifest."

The learned judge also says (Record in No. 562, p. 64):—

> "At this point we note that the prior action of "any State authorizing such carrier to own manu- "factories or mines could in no way detract from "the power of Congress thereafter to regulate "interstate commerce. Manifestly such purchases "under State authority created no obligation or "contract on the part of Congress that it never "would in pursuance of its power to regulate com- "merce between the States, make laws which might "restrict carriers from the interstate carriage of "their own products."

We think all will assent to the correctness of a proposition that the power of Congress to regulate interstate commerce cannot be detracted from by the different States.

The proposition, however, assumes that the action of the State in permitting mining, share ownership, &c., was one regulating commerce between the States. In point of fact, the mine development resulted from the power possessed by each State, to create corporations and to confer upon them dual power. Each State had the

right to confer upon its common carriers the right to own mines and manufactories, and to mine coal.

The Commodities Clause confronts us with a situation in which everything which had been done by the State had been done within its constitutional power. The only question is, whether Congress, under the pretext of regulating, may prohibit legitimate interstate commerce in the necessities of life, and may destroy the value of property legally held. In other words, may Congress, under the pretext of regulating commerce, destroy it? May Congress say to the citizens of other States: "You shall not deal with the owners of coal in "Pennsylvania where your coal requires to be trans-"ported by a carrier who owned it originally?" Can it deny to the citizens of other States the right to receive any portion of the immense amount of coal whose transportation is, by the Commodities Clause, practically rendered impossible?

As we have heretofore argued, the question is not simply whether Congress may "regulate interstate com-"merce," but also whether, without compensation, property to an immense extent can be rendered valueless?

The case, as the learned judge put it, is not the case before this court. It must determine what is a "regulation of commerce," and how far Congress may go, in the way of prohibition, in destroying the value of property and intercourse between the States.

If any shares of stock in a coal company are in the ownership of a carrier company, the product of such coal company cannot be sold, because it cannot be transported.

We are dealing with something beyond a mere theory—with vested rights, not only of the carriers, but of third persons.

It may be, and doubtless is, a proper regulation of commerce to forbid favoritism, but to prohibit a carrier, or a coal company whose shares the former holds, from transportation *in toto*, transcends any proper interpretation of the power to "regulate commerce."

It ignores certain constitutional rights of property and also a duty to compensate where such property is taken. A carrier presents itself at the boundary line of Pennsylvania and New Jersey desiring to continue transportation into the latter State. It is told it must stop on the Pennsylvania side and throw out of its cars all coal which belongs to itself, although it has done nothing wrong, duality of ownership up to the time it reached the State of New Jersey not having been wrong, but in accordance with law. All the coal in its train is a proper subject of interstate commerce and may be transported from one State into another. This transportation may be regulated. It cannot be forbidden. It is right that the transportation shall be under such rules and regulations as Congress may deem to be proper for transportation, but this immense body of interstate commerce articles cannot be excluded from carriage.

In the case of the Delaware & Hudson Co. and of the Delaware, Lackawanna & Western R. R. Co. each was originally authorized to transport coal intended to be mined by itself. From time to time, independent operators have arisen, who have acquired a right of transportation without favoritism. The right of the mine owners is to have their coal transported on equal terms with those of the carrier company; not to be given a monopoly by exclusion therefrom of everything not belonging to them.

This court, in Union Bridge Co. *vs.* United States, 204 U. S., 400, did hold that as soon as a bridge was found to interfere with a river, a public highway, it was within the power of Congress to remove it, in order that commerce might be transacted. There was no vested right in a bridge owner perpetually to obstruct commerce by blocking up the highway. In the case we are dealing with, there is an inherent right in every owner of merchandise to sell the same to the citizens of other States, and to have the product, when sold, transported.

There is a vested right in the citizens of other States to purchase, in Pennsylvania, coal which they desire, and to

have the same transported into another State for the purpose of enabling them to conduct their business needing a coal supply.

In the Union Bridge case, interstate commerce was directly affected, injuriously, by the bridge, which was constructed, originally, with the full knowledge by all concerned, that Congress could, at any time, exercise its power to open the highway. In the present case, there is no obstruction of commerce. Every carrier desires that its volume shall be as great as possible; but demands that it shall be made subject to regulation, not prohibition.

The great care with which this court, in the Lottery Cases, first established the fact that the transportation of lotteries was of an article not proper for transportation, seems strongly to support the assertion that the prohibition of carriage can only be, in the case of articles not legitimate subjects of intercourse.

This court investigated the question, whether or not lottery policies were properly a part of legitimate interstate commerce; asserting that whenever it was found that an article was not properly within the category of those in which commerce should be permitted, the power to regulate, carried with it the right and duty to prohibit, anything other than legitimate commerce.

There is nothing illegitimate in duality of ownership and transportation. Such duality results from the law of the State having jurisdiction over the carrier. Congress cannot say the carrier may not be the owner of coal, and where its coal reaches the boundary line of the State its transportation cannot be forbidden because the carrier is in a situation in which it *might* violate regulations.

The "regulation," so-called, prohibits, because of the possibility the carrier may favor itself. Why, under this doctrine, may not a prohibition go against the carrier because some of its officers have been convicted of crime, or because its stockholders and officers travel over its lines?

It can hardly be said that Congress, being of the opinion that three lines of railroad were sufficient to transact all the interstate commerce business, could forbid any other lines of carriers.

Every carrier which is ready to conduct interstate commerce under the rules and regulations governing the same, is at liberty to carry. The *methods* of its carriage can be regulated. The carriage itself cannot be forbidden.

Of course, rebates and lower rates under like circumstances, ought not to be allowed, or charged. A regulation is properly one of commerce, which forbids either, or both.

In the Chesapeake & Ohio case it was found not difficult to lay down the rule operative upon an interested carrier, the violation of which could be ascertained as a matter of fact.

Suppose there was but one line of railroad from the coal regions and a possession of all the coal mines by the company owning it. Under Judge Buffington's reasoning, the carrier might be forbidden to carry, no matter how much the citizens of other States might need coal, for he holds that Congress may forbid persons in other States buying within Pennsylvania from a carrier with a right of transport. He holds that a coal company in which a railroad company has an interest, however slight, may be debarred from the carriage of such coal.

No citizen of the United States, under this ruling, could buy coal from a carrier, which must be by it transported over its own line. His reasoning, if sustained, would render it impossible for an owner of coal in Pennsylvania, to sell to a citizen of another State, or for the citizen of another State to buy coal which must be carried over the line of a railroad company which had owned the coal or shares of stock in the company which had been the owner.

As we have already said, if the coal belongs to a coal company and the carrier owns a few shares of stock therein, it cannot be transported over the only line by

which it can be delivered into another State—the line of the "carrier-owner."

In other words, all interstate traffic in coal can be destroyed by Congress and all commerce can be prevented, under a power granted to it to "regulate" interstate commerce.

The carrier, if it deals alike with its own coal and with that of other shippers, does no harm.

In the case of the Attorney General of Great Britain *vs.* Great Northern Railroad Co., 29 Law Journal (N. S. Eq.), 794, nothing more was held than that an Act of Parliament which granted the charter to operate to a railroad company, contained in it an implied prohibition against the company engaging in any other business. The business was that of buying and selling coal from time to time. The court, in the English case, enforced the law which prohibited the carrier from engaging in any other business.

What was dealt with in the New Haven case was not only the favoritism which *might* be exercised by a carrier when it bought coal at the mines from persons it desired to favor, and transported it at such rates as balanced the disadvantage of high purchase price, but with the favoritism which was *actually* exercised. The railroad company gave itself, in fact, a rebate of part of the charge for transportation.

In the New Haven case the carrier had no vested right in coal land nor in coal mining. A., from whom it purchased coal, was enabled by what it did, to get a higher price for its coal than could have been obtained, if he had transported it, in the usual course, into another State.

It was found that there had been practically a rebate allowed, in violation of the Interstate Commerce Law.

If the defendants in error had been guilty of allowing indirectly a rebate, they could now be punished. There is no pretense they have not been charging the full rates of transportation. On the contrary, it is averred they did.

The learned dissenting Judge says (Record in No. 562, p. 68):—

> "That Congress in passing this Act sought not "to confiscate private property, but rather to avert "by due regulation the evils the carrier had itself "brought about by allowing private interest to "injuriously affect public duty. * * * yet the "recognition by courts of an evil to be remedied "and the avowed purpose of Congress to stop such "evil may throw some light on that which, after "all said, is a question of fact rather than law, "namely, whether this act is a real regulation of "commerce, or under the guise of regulation, a "prohibition of holding property."

There is no proof, upon the record, that any carrier had allowed "private interest to injuriously affect public "duty."

There was an evil to be remedied, *i. e.*, allowing rebates and making concessions. This evil Congress might punish.

Theft is an evil; but it would hardly be thought within the power of the Legislature to deprive a person of his property before he had done wrong, so as thus to remove the temptation to steal.

Supporting the criminal classes in prisons is expensive. Because the members thereof are prone to the temptation of appropriating the property of others, may they be electrocuted in advance? Such drastic means as the Commodities Clause, it is true, if introduced generally, might save much trouble, in ascertaining the existence of crime.

The large percentage, (90%), of unmined area of anthracite coal, owned or controlled by the defendants in error, and their so-called "subsidiary coal companies," is the result of a validly granted power by the State of Pennsylvania. The learned dissenting Judge says (Record in No. 562, p. 69):—

> "Ninety per cent approximately of the entire "unmined area of anthracite coal is owned or con-"trolled by the following named companies" (most "of whom are defendants in error) "or by so-"called 'subsidiary coal companies.'"

We concede that this fact is "highly suggestive." The Court, we hope, will be reluctant to protect the independent shipper, holding ten per cent. of the product, who has not been found to have been injured by allowance to others of lower rates, rebates or concessions, at a cost of destruction of the value of ninety per centum of the property held as is stated in this Record. This ownership being one Congress had no right to control, it has no right to inflict a penalty upon those who possess it.

We do not think a lesion of the brain would result from any mental effort necessary to determine whether or not the Commodities Clause is a "real regulation of "commerce" or a prohibition of holding. The result of a prohibition against the ownership of coal property, or of an enactment that the property shall continue to be held under such treatment as must destroy its value, is the same.

At the present time, if the coal properties were still in the hands of private owners, the Legislature of Pennsylvania might enact a Statute which would forbid the common carrier from buying them, and many would concede such legislation to be proper; but, under the circumstances which exist, the Legislature of Pennsylvania can pass no enactment which will interfere with the ownership, by the defendants in error, of coal lands or of coal companies' shares.

The "evil" which exists is not duality of ownership, but the allowance of low rates, rebates and concessions. There is no proof that private interest, on the part of any of the defendants in error, injuriously affected their performance of their public duty. Did such proof exist, the carriers could be punished, under the Act which announces the evil, and provides for its repression.

The learned Judge says, Congress may have felt justified in restricting transportation regulation "when it saw "that these private acquisitions by public carriers, up to "ninety per cent. of the entire anthracite supply, had "resulted from the mere inaction of Congress to restrict "carriers in their interstate relations to their public and "primary service of transportation."

Had Congress been active in legislation of that character, between 1840 and 1875, the carriers would not, perhaps, have owned ninety per cent. of the coal mining properties; but most probably, there would have been no transportation facilities for the coal and it would not have been mined, because the mere right to transport would not have justified the construction of the railroads themselves.

Congress was inactive and the carriers were, by reason thereof, induced to open mines and build railroads. Congressional action came too late to justify, in 1907, the confiscation of property which had been acquired, in order that there might be interstate commerce.

It is said "it follows that any control or regulation of "the carrier by a State which affects the performance of "the carrier's interstate service, is unconstitutional."

The State is not attempting to control, or regulate, the carrier. Its statutes were enacted in order that there might be something to carry. The past action of the State cannot be invoked against the carrier, as amounting to a "control or regulation," by it, of such carrier.

Congress will be "trenching on the right of the State" if it destroys the value of property in any State, held under the charter grants. Concede that the State may not insist that the carrier shall not transport into another State. It has a right, however, to insist that Congress shall not destroy the value of property, held under its laws, by forbidding its use in such way, and under such circumstances, as have been immemorially existing.

We fail to see any logical connection between premises and conclusion thus stated (Record in No. 562, p. 70):—

> "Such being the case, one of two results must "follow—either the right to regulate the interstate "carrier's efficient performance of duty rests in "Congress and its regulation must prevail, or no "power to regulate interstate carriers exists and "the carriers 'are a law unto themselves.'"

Congress may pass such regulations as will secure punishment for inefficient performance of duty. There

is a great gulf, however, between the power to do this, and the power to prevent interstate commerce, conducted without any favor, by a carrier who obeys every transportation demand and requirement.

There is an unwarranted assumption in these words (Record in No. 562, p. 70):—

> "Now, it would seem idle for practical men to "discuss the question whether regulation of the "carrier to insure performance of its duty is not "vital to the regulation of commerce. In the very "nature of things, the right of the people of one "state to market their products in another, and "the corresponding right of the people of the latter "to enjoy the products of the former, cannot be "mutually enjoyed unless there be some regula- "ting power over the carrier who performs the "interstate service."

The so-called regulation does, "in the very nature of "things," affect the rights of American citizens to transact interstate commerce.

We concede that this right is the subject of regulation; but we deny that regulation covers absolute prohibition. Regulation is "vital to the regulation of commerce;" but the destruction of ninety per cent. thereof to protect ten per centum can hardly be called "regula- "tion."

The learned dissenting Judge says (Record in No. 562, p. 71):—

> "And clearly, the general power to forbid a public "carrier from doing what hinders its performance of "a public duty could not, before the Constitution, "be denied to a sovereign State for 'the States were "'unquestionably supreme and each possessed that "'power over commerce which is acknowledged "'to reside in every sovereign State.'"

There was no power in the State to forbid a railroad corporation by it created, to which it had granted the right to own coal lands and coal shares and to mine coal,

THE UNITED STATES *ex rel.* THE ATTORNEY GENERAL OF THE UNITED STATES *v.* DELAWARE AND HUDSON COMPANY.

SAME *v.* ERIE RAILROAD COMPANY.

SAME *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SAME *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

SAME *v.* PENNSYLVANIA RAILROAD COMPANY.

SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

THE UNITED STATES, APPELLANT, *v.* DELAWARE AND HUDSON COMPANY.

SAME *v.* ERIE RAILROAD COMPANY.

SAME *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SAME *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

SAME *v.* PENNSYLVANIA RAILROAD COMPANY.

SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570. Argued January 19, 20, 1909.—Decided May 3, 1909.

Although a limitation to its operation might be reasonable and thus assuage the radical results of a prohibitory statute, if it is not expressed in the statute, to engraft such a limitation would be pure

judicial legislation. In construing the commodities clause of the Hepburn Act the suggestion of the Government to limit its application to commodities while in the hands of a carrier or its first vendee, and, as thus construed, extend the indirect interest prohibition to commodities belonging to corporations the stock whereof is owned in whole or in part by the carrier, or those which had been mined, manufactured or produced by the carrier prior to the transportation, cannot be accepted.

The duty of this court in construing a statute which is reasonably susceptible of two constructions, one of which would render it unconstitutional and the other valid, to adopt that construction which saves its constitutionality (*Knights Templar Indemnity Co.* v. *Jarman*, 187 U. S. 197) includes the duty of avoiding a construction which raises grave and doubtful constitutional questions if the statute can be reasonably construed so as to avoid such questions. *Harriman* v. *Interstate Com. Comm.*, 211 U. S. 407.

This rule applied to the commodities clause of the Hepburn Act so as to avoid deciding the constitutional questions which would arise if the clause were construed so as to prohibit the carrying of commodities owned by corporations of which the carrier is a shareholder, or which it had mined, manufactured or produced at some time prior to the transportation.[1]

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[1] The grave constitutional questions which the court could not have avoided answering by adopting the construction contended for by the Government are as follows (see p. 406, *post*):

1. Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce.

2. If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in interstate commerce from carrying lawful articles or commodities because, at some time prior to the transportation, it had manufactured, mined, produced or owned them, etc.?

Also as necessarily involved in the determination of the foregoing questions:

a. Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the States of the authority to endow a carrier with the attribute of producing as

Where ambiguity exists it is the duty of a court construing a statute to restrain the wider and doubtful provisions so as to make them accord with the narrow and more reasonable provisions and thus harmonize the statute.

A prohibition in an act of Congress will not be extended to include a subject where the extension raises grave constitutional questions as to the power of Congress, where one branch of that body rejected an amendment specifically including such subject within the prohibition.

In the construction of a statute the power of the lawmaking body to enact it, and not the consequences resulting from the enactment is the criterion of constitutionality.

The provision contained in the Hepburn Act approved June 29, 1906, c. 3591, 34 Stat. 584, commonly called the commodities clause, does not prohibit a railway company from moving commodities in interstate commerce because the company has manufactured, mined or produced them, or owned them in whole or in part or has had an interest direct or indirect in them, wholly irrespective of the relation or connection of the carrier with the commodities at the time of transportation.

The provision of the commodities clause relating to interest, direct or indirect, does not embrace an interest which a carrier may have in a producing corporation as the result of the ownership by the carrier of stock in such corporation provided the corporation has been organized in good faith.

Rejecting the construction placed by the Government upon the commodities clause, it is decided that that clause, when all its provisions are harmoniously construed, has solely for its object to prevent carriers engaged in interstate commerce from being associated in

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well as transporting particular commodities, a power which the States from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several States have been developed, their enterprises fostered, and vast investments of capital have been made possible?

b. Although the Government of the United States, both within its spheres of national and local legislative power, has in the past for public purposes, either expressly or impliedly, authorized the manufacture, mining, production and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?

interest at the time of transportation with the commodities transported, and it therefore only prohibits railroad companies engaged in interstate commerce from transporting in such commerce commodities under the following circumstances and conditions:

a. When the commodity has been manufactured, mined or produced by a railway company or under its authority and at the time of transportation the railway company has not in good faith before the act of transportation parted with its interest in such commodity;

b. When the railway company owns the commodity to be transported in whole or in part;

c. When the railway company at the time of transportation has an interest direct or indirect in a legal sense in the commodity, which last prohibition does not apply to commodities manufactured, mined, produced, owned, etc., by a corporation because a railway company is a stockholder in such corporation. Such ownership of stock in a producing company by a railway company does not cause it as owner of the stock to have a legal interest in the commodity manufactured, etc., by the producing corporation.

As thus construed the commodities clause is a regulation of commerce inherently within the power of Congress to enact. *New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361. The contention that the clause if applied to preëxisting rights will operate to take property of railroad companies and therefore violate the due process provision of the Fifth Amendment, having been based upon the assumption that the clause prohibited and restricted in accordance with the construction which the Government gave that clause is not tenable as to the act as now construed which merely enforces a regulation of commerce by which carriers are compelled to dissociate themselves from the products which they carry and does not prohibit where the carrier is not associated with the commodity carried.

The constitutional power of Congress to make regulations for interstate commerce is not limited by any requirement that the regulations should apply to all commodities alike, nor does an exception of one commodity from a general regulation of interstate commerce necessarily render a statute unconstitutional as discriminating between carriers; and the exception of timber in the commodities clause of the Hepburn Act does not render the act unconstitutional, nor can the question of the expediency of such an exception affect the question of power.

Where, as in this instance, the provision for penalties is separable from the provisions for regulations, the court will not consider the question of the constitutionality of the penalty provisions in a suit brought

by the Government to enjoin carriers from violating the regulations and in which no penalties are sought to be recovered.

As the construction now given the act differs widely from the construction which the Government gave to the act and which it was the purpose of these suits to enforce, it is not necessary in reversing and remanding, to direct the character of decrees which shall be entered, but simply to reverse and remand the case with directions to enforce and apply the statute as it is now construed.

Although the Delaware and Hudson Company may originally have been chartered principally for mining purposes, as it is now engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, it is a railroad company within the purview of the commodities clause and is subject to the provisions of that clause as they are now construed.

164 Fed. Rep. 215, reversed.

THE facts which involve the constitutionality and construction of the commodities clause of the Hepburn Act, § 1, c. 3591, act of June 29, 1906, 34 Stat. 584, are stated in the opinion.[1]

The Attorney General and *The Solicitor General*, with whom *Mr L. Allison Wilmer* and *Mr. Thomas C. Spelling* were on the brief, for the United States:

The question of the reasonableness of a statute is for the legislature, but the clause in question is a reasonable exercise of the power of Congress.

If a statute pertains to a subject exclusively committed to Congress, the statute is within the scope of constitutional power; this statute is within the scope of power conferred by the Con-

[1] "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

stitution. *The Lottery Case*, 188 U. S. 321, 357; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 344; *The Daniel Ball*, 10 Wall. 557, 566.

Congressional non-action lends no color of authority or validity to state regulations of anything properly pertaining to interstate commerce. *Leisy* v. *Hardin*, 135 U. S. 100, 109, 110–122; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 216, 229, 232; *Crandall* v. *Nevada*, 6 Wall. 35, 48, 49; *Houston* v. *Moore*, 5 Wheat. 23; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386. When the Federal power has been exercised, it is, by the express terms of the Constitution, the exercise of the supreme will, and the state regulation must, in so far as there is a conflict, give way. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 199; *McCulloch* v. *Maryland*, 4 Wheat. 422; *Asbell* v. *Kansas*, 209 U. S. 251, 254; *Leisy* v. *Hardin*, 135 U. S. 100, 109; *Houston* v. *Moore*, 5 Wheat. 1, 23; *Brown* v. *Maryland*, 12 Pet. 446; *Groves* v. *Slaughter*, 15 Pet. 448, 510, 511; *New York* v. *Miln*, 11 Pet. 102, 157–159.

Not even a State, still less one of its artificial creations, can stand in the way of the enforcement of an act of Congress constitutionally passed under its authority to regulate commerce. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 333; *McCulloch* v. *Maryland*, 4 Wheat. 427, 429, 432, 435; *Cohens* v. *Virginia*, 6 Wheat. 264, 385, 414.

Corporations created by the States are as much subordinate to the powers of Congress, in the regulation of interstate commerce, as if they had been created by acts of Congress. *Hale* v. *Henkel*, 201 U. S. 43, 75.

If a State can by the creation of a corporation and by conferring upon the corporation certain powers forestall the operation of subsequent Federal laws before their enactment, the provision in the Constitution that laws made pursuant to its provisions shall be the supreme law of the land, may be at any time nullified. See *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Henderson* v. *Mayor of New York*, 92 U. S. 259, 272; *Railroad Co.* v. *Husen*, 95 U. S. 471.

The prohibitions contained in this statute do not prevent its constituting legislation which Congress may enact under the commerce clause of the Constitution.

Congressional power over commerce among the States is analogous to the same power over foreign commerce. *Crutcher* v. *Kentucky*, 141 U. S. 57; *Brown* v. *Houston*, 114 U. S. 622, 630; *Gibbons* v. *Ogden*, 9 Wheat. 1, 192.

The recognized powers as to foreign commerce, such as laying an embargo as to products of other nations in a time of peace, and the power to forbid and punish introductions of coins of foreign nations, illustrate Congressional power to forbid transportation of commodities from State to State, under circumstances requiring such prohibition in the national interest. *United States* v. *Marigold*, 9 How. 560, 566.

Interstate railroads are peculiarly subject to regulation, by reason of their performance of public functions and duties. They are vested with public rights to enable them to serve public interests as common carriers, and Congress has the power to divorce their public duties as such public servants from their private interest in carrying their own products. *New Haven R. R.* v. *Interstate Com. Comm.*, 200 U. S. 361; *Cherokee Nation* v. *South Kansas R. R. Co.*, 135 U. S. 657.

The question of the reasonableness or of the wisdom of the enactment is not for the courts but for the legislature. *Silz* v. *Hesterberg*, 211 U. S. 31, 40; *State* v. *Hyman*, 98 Maryland, 618, 619; *City of Baltimore* v. *Radecke*, 49 Maryland, 217, 229, 230.

Arguments *ab inconvenienti* are not to be considered unless the language of the act be ambiguous. *Ex parte Kearney*, 7 Wheat. 38, 44; *Beardstown* v. *Virginia*, 76 Illinois, 34; *Greencastle* v. *Black*, 5 Indiana, 557; *Smith* v. *Thursby*, 28 Maryland, 244; *Henshaw* v. *Foster*, 9 Pick. (Mass.) 312, 316; *Gage* v. *Currier*, 4 Pick. (Mass.) 399.

The courts are not at liberty to declare an act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in its words. Cooley,

Const. Lim. (5th ed.) 205; *People* v. *Fisher*, 24 Wend. 215, 220; *State* v. *Staten*, 6 Coldw. (Tenn.) 238; *Walker* v. *Cincinnati*, 21 Ohio St. 14; *People* v. *Rucker*, 5 Colorado, 455; *Commonwealth* v. *McCloskey*, 2 Rawle, 374.

The presumption is in favor of validity, and only when the question is free from reasonable doubt will the Supreme Court hold an act of Congress to be in violation of the Constitution. *Nicol* v. *Ames*, 173 U. S. 509; *Fletcher* v. *Peck*, 6 Cranch, 126.

For protection against unjust or unwise legislation, within the limits of recognized legislative power, the people must look to the polls and not to the courts. It would be an abuse of judicial power for the courts to attempt to interfere with the constitutional discretion of the legislature. *Covington Bridge Case*, 105 U. S. 470, 482; *The Lottery Case*, 188 U. S. 321; *Joint Traffic Association Case*, 171 U. S. 505, 573; *Northern Securities Case*, 193 U. S. 337; *Beebe* v. *State*, 6 Indiana, 501, 528; *Johnston* v. *Commonwealth*, 1 Bibb, 603; *Flint River Steamboat Co.* v. *Foster*, 5 Georgia, 194; *State* v. *Kruttschnitt*, 4 Nevada, 178; *Walker* v. *Cincinnati*, 21 Ohio St. 14; *Hills* v. *Chicago*, 60 Illinois, 86; *Ballentine* v. *Mayor &c.*, 15 Lea, 633; *State* v. *Traders' Bank*, 6 So. Rep. 582.

If power exists, it is to be assumed that legislative discretion has been properly exercised. Cooley, Const. Lim. (6th ed.,) 220; *People* v. *Lawrence*, 36 Barb. 177; *People* v. *N. Y. Cent. R. Co.*, 34 Barb. 123; *Baltimore* v. *State*, 15 Maryland, 376; *Goddin* v. *Crump*, 8 Leigh, 154; *Soon Hing* v. *Crowley*, 113 U. S. 703.

The prevention of monopoly has long been a legitimate object of legislation. *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S. 646, 676; *Northern Securities Case*, 193 U. S. 341. Far stronger reasons, referable to a well-founded fear of monopoly, exist for prevention of a union of ordinary occupations, such as trading and producing, with transportation, by railroad corporations, than can be urged against consolidations such as were forbidden in the *Northern Securities Case*.

The term "commerce," as used in the Constitution, embraces the instrumentalities by which commerce is carried on.

Northern Securities Co. v. *United States*, 193 U. S. 197; *Railroad Co.* v. *Fuller*, 17 Wall. 500, 508; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203. When a railroad is engaged, as are the roads owned by the defendants, in interstate commerce, it is necessarily an instrumentality of interstate commerce. When, therefore, they entered into such combinations as are shown in this case, such restrictive arrangements gave them the essential character of contracts, combinations, or conspiracies in restraint of trade or commerce, whereby the defendants monopolized, or attempted to monopolize, trade or commerce among the several States or with foreign nations. *Coxe Brothers & Co.* v. *Lehigh Valley Railroad Co.*, 4 I. C. C. Rep. 468; *New Haven R. R.* v. *I. C. C.*, 200 U. S. 392, 393; *United States* v. *Freight Association*, 166 U. S. 290, 333, 334; *Joint Traffic Association Case*, 171 U. S. 577; *Addyston Pipe Case*, 175 U. S. 211, 244.

The highways of commerce are, in a sense, the public property of the Nation and subject to all the requisite legislation by Congress, which necessarily includes the power to keep them open and free from any obstruction, and Congress has, in this regard, all the powers that existed in the States before the adoption of the Constitution. *Gilman* v. *Philadelphia*, 3 Wall. 713, 724; *In re Debs*, 158 U. S. 564, 586.

These combinations between state corporations, one or more being industrial and the other a common carrier, would be amenable to a state law formulated in like terms as the Anti-Trust Act. *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 294; *People* v. *North Riv. Sug. Ref. Co.*, 54 Hun (N. Y.), 377. And if such combinations interfere with the laws of free competition in interstate commerce, and cannot be effectively dealt with under the anti-trust act, Congress can provide another and more effective remedy. *Sturgis* v. *Crowninshield*, 4 Wheat. 122; *McCulloch* v. *Maryland*, 4 Wheat. 315; *United States* v. *Fisher*, 2 Cranch, 358, 396; *Juilliard* v. *Greenman*, 110 U. S. 440, 441; *In re Jackson*, 14 Blatch. 250.

The law here in question does not violate the guarantees of the Fifth Amendment, nor any other constitutional guarantees. The prohibition of the so-called commodities clause is not arbitrary as that word is defined in the decisions of this and other courts. *Gulf, Col. & S. F. Ry.* v. *Ellis*, 165 U. S. 150, 155; *A., T. & S. F. R. R.* v. *Matthews*, 174 U. S. 96; *Clark* v. *Kansas City*, 178 U. S. 114; *Tullis* v. *Lake Erie & Western R. R.*, 175 U. S. 348; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557.

It cannot be said that this statute is on its face a deprivation of life, liberty or property without due process of law, in the sense in which the phrase is ordinarily used. It is as proper an exercise of power under the commerce clause to forbid, conditionally, shipments of a certain class or description as to forbid discrimination. See *Joint Traffic Association Case*, 171 U. S. 571; *Addyston Pipe Case*, 175 U. S. 211. When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, the court cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. *People* v. *Fisher*, 24 Wend. 215, 220. To the same effect are *State* v. *Staten*, 6 Coldw. (Tenn.) 238; *Walker* v. *Cincinnati*, 21 Ohio St. 14; *State* v. *Smith*, 44 Ohio St. 348; *People* v. *Rucker*, 5 Colorado, 455; *Whallon* v. *Ingham*, 51 Michigan, 503; *Wooten* v. *State*, 5 So. Rep. 39; *Cochran* v. *Van Surlay*, 20 Wend. 365, 381, 383; *People* v. *Gallagher*, 4 Michigan, 244; *Benson* v. *Mayor &c.*, 24 Barb. 248; *Grant* v. *Courter*, 24 Barb. 232.

The clause does not violate the provision that no person shall be deprived of property without due process of law. When it is claimed that a legislative act is inhibited by the due process clause, as applied to property, there must be an interest amounting to a vested right of property. If a right claimed is not of that character, then it is merely an inchoate right—a privilege. Rights are vested when the right to enjoyment, present or prospective, has become the property of

some particular person or persons, as a present interest. 8 Cyc. L. & Proc., 894; Cooley, Const. Lim. 438, 465; *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S. 646, 673. No right can be vested as a result of action which invades the domain of congressional power to regulate commerce, whether Congress has already acted or yet withholds action on the subject. Cooley, Const. Lim. (6th ed.) 437, 438; *Fitzgerald* v. *Grand Trunk R. R. Co.*, 63 Vermont, 169; *S. C.*, 13 L. R. A. 70; *Union Bridge Case*, 204 U. S. 364.

Retrospective Federal laws, unless *ex post facto*, are not within the due process clause or any other prohibition of the Constitution, however repugnant to the principles of sound legislation. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Satterlee* v. *Mathewson*, 2 Pet. 380; *Bonaparte* v. *Camden*, Baldw. 205; *S. C.*, Fed. Cas. No. 1617; *Bennett* v. *Baggs*, Baldw. 60; *S. C.*, Fed. Cas. No. 1319; *Albee* v. *May*, 2 Paine, 74; *S. C.*, Fed. Cas. No. 134.

No valid argument can be based upon long acquiescence in the use made of their coal lands and their output by the railroads on the part of the United States; for no estoppel can be asserted against constitutional legislation. *Louisville & Nashville R. R. Co.* v. *Kentucky*, 161 U. S. 677, 689; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Bridge Company* v. *United States*, 105 U. S. 470.

Not only is the Government not barred by acquiescence in what the defendants have done, whether with or without state authority, but Congress could not have bartered away or estopped itself to exercise any of its constitutional powers. *Monongahela Nav. Co.* v. *Coons*, 6 W. & S. (Pa.) 101; *Susquehanna Canal Co.* v. *Wright*, 9 W. & S. (Pa.) 9; *New York & Erie Railroad Co.* v. *Young*, 33 Pa. St. 175; *McKeen* v. *Delaware Canal Co.*, 49 Pa. St. 424; *Freeland* v. *Pennsylvania Railroad*, 66 Pa. St. 91; *Bailey* v. *Phil., Wilm. & Balt. Railroad*, 4 Harr. (Del.) 389; *Rundle* v. *Del. & Raritan Canal Co.*, 14 How. 80.

The clause does not violate the provision that private prop-

erty shall not be taken for public use without just compensation. See *Union Bridge Co.* v. *United States*, 204 U. S. 364; Cooley, Const. Lim. (6th ed.) 473.

The commodities clause is not open to the objection that the penalties imposed for violations thereof are of such magnitude and so unduly excessive and extortionate as to be substantially destructive of the property and franchises of the carriers affected thereby. nor does it, in respect to such carriers, constitute a denial of the equal protection of the law. Cooley, Const. Lim. 402; *Coffey* v. *Harlan County*, 204 U. S. 659, 665.

The clause does not give a preference to the ports of one State over those of another, contrary to Art. I, § 9, clause 6 of the Constitution. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80; and see also *Pennsylvania* v. *Bridge Co.*, 18 How. 421, 435.

The clause does not deny full faith and credit to the public acts of a State contrary to Art. IV, § 1 of the Constitution.

This clause did not confer any power or jurisdiction upon the States, but merely assured the recognition of their acknowledged jurisdiction over persons and things within the respective territory of each of them. Story, Const., § 1313; *Bissell* v. *Briggs*, 9 Massachusetts, 462, 467; *Shunway* v. *Stillman*, 4 Cowen, 292; *Borden* v. *Fitch*, 15 Johns. 121; Story, Confl. of Laws, § 609; *McElmoyle* v. *Cohen*, 13 Pet. 312; *D'Arcy* v. *Ketchum*, 11 How. (U. S.) 165. The States of New York and Pennsylvania could no more diminish or increase or forestall Federal regulation of interstate commerce than they could bind the Nation by a treaty with a foreign government, or by a declaration of war against a friendly nation.

The clause does not deny persons any privileges or immunities of citizens of the States contrary to Art. IV, § 2, subd. 1, of the Constitution.

A corporation acquires by its charter no extraterritorial powers, immunities, or privileges, even if it were clear that this constitutional provision was intended to apply to corporations. In fact this constitutional provision has been always held a

prohibition against state, and not against Federal, action, though there is nothing in this statute or in the record rendering the question relevant.

The clause does not invade the reserved rights of the people or of the States contrary to the Ninth and Tenth Amendments or any other provisions of the Constitution, nor does it deprive any person of any right of property or other right secured by § 2 of Art. IV, or by the Fifth, Eighth, Ninth, Tenth or Fourteenth Amendment, or by any other Amendment or provision of the Constitution.

This objection is yet another form of saying that the people have never conferred upon Congress the power to enact the commodities clause, or that it is not on its face a constitutional exercise of the power to regulate interstate commerce. It is only where Congressional power is claimed upon an inherent sovereignty theory, or under the general-welfare clause, that such an objection can be pertinent, as, for example, in a case like *Kansas* v. *Colorado*, 206 U. S. 46, where power was claimed for Congress to interpose in the distribution of the inland waters of a State for irrigation purposes.

No right not under protection of the prohibitions or guarantees of the Federal Constitution can be set up against an authorized regulation of interstate commerce, even though such right be given in terms by a state law. If the court finds constitutional authority for the commodities clause then no state charter can furnish to the defendant any protection or defense in an action brought for its enforcement.

No relations assumed by individuals, nor rules governing such relations *inter sese*, whether made by the individuals themselves or by a State, can stand in the way, where an issue arises between them and the Government, to prevent the enforcement of a constitutional law. The right of a State to create a corporation and vest it with certain powers does not carry with it the right to project either the powers of the State or of the corporation across state lines, and thus invade the domain of interstate commerce, which it is the sole province of Congress

to regulate and protect. *W. U. Tel. Co.* v. *Pendleton*, 122 U. S. 347, 357, 358.

Each State has plenary local powers over its own territory and its own corporations. But a State, while exercising state sovereignty over a corporation of its creation, cannot prevent or embarrass the exercise by Congress of any power intrusted to it by the Constitution. *Railroad Co.* v. *Maryland*, 21 Wall. 456, 473; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 347. See also *Brown* v. *Maryland*, 12 Wheat. 419; *Passenger Cases*, 7 How. 283; *In re Debs*, 158 U. S. 564; *Lottery Case*, 188 U. S. 321; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 11, 16.

The clause does not impair the obligation of contracts. Without going so far as to say that such obligations as are set forth in the answers are invalid, notwithstanding the authority and sanction of state laws, defendants will not be heard to set them up to defeat a Federal law, passed in the exercise of power constitutionally conferred. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 347; *New Haven R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 569, 571.

All the defendant companies have an "interest" in the coal transported, within the meaning of the word "interest" as used in the statute. The interest of the companies, or any one of them, may not be a legal interest, but it is none the less real and substantial. *Humphreys* v. *McKissock*, 140 U. S. 304, 312; *Burton* v. *United States*, 202 U. S. 344.

The exception in the statute of "timber and the manufactured products thereof" from the prohibition contained in the statute, does not render the statute unconstitutional. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, discussed, and distinguished from this phase of the case at bar.

The contention of the defendants that they have no interest, within the meaning of the clause in question, in the coal trans-

ported by them which is mined and sold by the coal companies of which they own all, or a large part, or some part, of the capital stock, is wholly without force. The same is true of the assertion of the Delaware and Hudson Company that because of a sale of part of its coal at the mines, it is not the owner thereof when transportation begins, or at any time thereafter. Equally without merit is the contention of the Lackawanna Company that its ownership of capital stock of coal companies does not constitute an interest, direct or indirect, in the coal mined by such companies and transported over its lines of railroad.

The purpose to be attributed to Congress in enacting the statute, as well as the language of the statute itself, precludes the view that a legal interest only was referred to. The purpose of the statute, which was to be gathered from the history of the times and the conditions that were to be remedied, was to prevent discrimination on the part of railroads engaged in interstate commerce against the shippers of the country in the interest of themselves or persons or corporations under their control or in which they were interested. The idea of Congress was to free interstate transportation from the dangers arising from self-interest on the part of the carriers. The temptation to indulge in secret rebating in the transportation of coal in interstate commerce, and in other favoritism, is as great where the carrier owns a majority of the stock of a coal mining company as where it is itself directly engaged in the mining of coal. In the one case its interest in the coal is direct, in the other it is indirect, but in both cases its interest is substantially the same so far as the purpose which Congress may be presumed to have had in view is concerned. *Burton* v. *United States*, 202 U. S. 344.

A railroad company has an interest in a corporation or the property of a corporation whose stock it holds. It is true it is not such an interest as it can mortgage or assign (*Humphreys* v. *McKissock*, 140 U. S. 304, 312); it is not a legal interest, but it is none the less real and substantial. See *Pullman Car Co.* v.

Missouri Pacific Co., 115 U. S. 587, 597; 4 Words and Phrases Judicially Defined, 396 *et seq.*, and cases there cited.

As to the Delaware and Hudson's claim, it is argued on behalf of that company that the statute should be read as if the word "or" in the expression "any article or commodity other than timber and manufactured products thereof, manufactured, mined, or produced by it or under its authority, *or* which it may own in whole or in part," should be read as if it were "and," so that it would not apply to the transportation by a railroad company of coal mined by it, but the title to which had passed from it. Otherwise, it is argued, it would be impossible for a railroad company to transport any coal mined by it, although title to it may have passed through several purchasers. This amounts merely to saying that the statute, as drawn, is impolitic, but the statute is to be given a reasonable construction to accomplish the purpose of Congress in its enactment. The interest that a railroad might have in transporting for the vendee, at less than the published tariff rate, coal mined by it and sold at the mines, is apparent. But ordinarily it would have no such interest in respect to the transportation of such coal for any subsequent purchaser from its vendee. The latter case would not be within the spirit and purpose of the act, although it might come within its letter.

Mr. John G. Johnson, *Mr. Robert W. De Forest* and *Mr. Walker D. Hines* for defendants in error and appellees. (*Mr. Johnson* and *Mr. De Forest* for defendants in error and appellees generally, *Mr. Hines* for the Delaware and Hudson Company.)

Mr. Johnson and *Mr. De Forest:*

The commodities clause is not applicable in the case of carriers who do not own or mine coal, but simply own shares of stock in coal companies. Under the statutes of Pennsylvania and under the decisions of that State, a railroad company does not have an interest in the coal because of its ownership of shares of stock of coal companies. See act of assembly of

Pennsylvania, approved April 26, 1855 (P. L. 329); *Commonwealth* v. *Monongahela Company*, 216 Pa. St. 114; *Shepard's Estate*, 170 Pa. St. 323; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *Commonwealth &c.* v. *N. Y., L. E. & W. R. R. Co.*, 132 Pa. St. 591; *Buffalo Loan, Trust & Safe Dep. Co.* v. *Medina Gas & Electric Co.*, 162 N. Y. 67, 76; *Saranac & Lake Placid R. R. Co.* v. *Arnold*, 167 N. Y. 368, 374; *Peterson* v. *C., R. I. & P. Ry. Co.*, 205 U. S. 364; *Pullman Car Co.* v. *Mo. Pac. Co.*, 115 U. S. 587.

The commodities clause is unconstitutional because its penalties are so prescribed as practically to amount to a denial of an opportunity by railroad companies to obtain a judicial determination of the questions involved. See *Ex parte Young*, 209 U. S. 147; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 595; *Chicago Railway Co.* v. *Minnesota*, 134 U. S. 418, 456.

The commodities clause is unconstitutional because, making illegal discriminations, it is not due process of law. If the act is improperly discriminating in any vital part, it is invalid as to the whole. All the vital portions of an act constituting a whole, have mutual relation, and any failure in any one vital part destroys the entire enactment. Non-uniformity cannot be sustained because sought to be effected under the guise of a classification of that which cannot be classified. A statute of the United States, establishing a public policy, in the matter of uniformity must stand upon the same basis as a statute of a State. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 560. The commodities clause discriminates in three important particulars: between different owners of coal, without justification; between carriers of timber and its manufactured products; between different classes of common carriers.

The commodities clause is unconstitutional because it forbids a railroad company, obeying every rule of transportation prescribed by Congress, to transport an article of commerce which not only is harmless, but is one of the necessaries of life. The act is not a regulation but a prohibition. In discussing this proposition, there is no difference between the rights of

an individual and the rights of a corporation. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204. The *Lottery Case*, 188 U. S. 321, is not an authority sustaining the right of Congress to pass the commodities clause. In the present case, the article carried is harmful neither to morals nor to health. It is a necessity of life. The *Lottery Case* (*supra*), quoted from and discussed. As to what is included in the word "commerce," see *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203.

Whilst prohibition of the transportation of articles injurious to health or morals is included within the idea of a regulation of commerce, a prohibition of such transportation, where the articles are necessaries of life, is not within such idea. A requirement that transportation shall be conducted without favoritism, or discrimination, and not at excessive rates, is included within a regulation. Congress may forbid contracts in restraint of trade, because such contracts interfere with commerce and indirectly regulate the same. *The Addyston Case*, 175 U. S. 211, 226.

Where articles are forbidden to be transported because the owner is engaged in the carriage of like commodities for itself as well as for others, such forbidding goes beyond the province of regulation and introduces something not within the grant of a power to regulate, *i. e.*, a condemnation of a duality of ownership and transportation which had resulted from legislation by the States, in a matter over which they had control. It practically takes away property, or at least destroys the value of property, vested in its owner by the law of the only country which can control it, *i. e.*, the State in which it is located.

Commerce does not result from any grant in the Constitution, to Congress, of power to permit or disallow the same, nor from any permission by Congress. It is an inherent right, possessed by every citizen. A prohibition, therefore, which does not regulate the right, but denies and destroys it, must rest upon a power different from that granted by a permission to regulate.

The very grant of power to regulate commerce, recognizes the existence of a right to carry it on, derived from some other, and independent, source.

The right of property is one secured to every citizen of the United States, under and against the Government, by the Constitution of the United States. This right, which, as will be probably conceded, includes that of commerce, is taken away by the commodities clause. Countless hundreds of millions of dollars of property values are destroyed at a stroke of the Congressional pen, without evidence of the existence of any necessity for such destruction.

The interstate commerce which is forbidden by the commodities clause is (1) transportation of its own products by a railroad company; and (2) sales by the citizens of one State, of their property, to citizens of another State, under certain circumstances.

Conceding the right to regulate the transportation in such way and manner as to compel it to conform to all such reasonable rules as the legislature may prescribe, the right does not exist to prohibit it where such rules are complied with. Included in this denial, is a denial of the conclusion that duality of ownership and of transportation, *ex necessitate*, amounts to violation of such rules of transportation.

Neither intercourse between the States, involving a carriage of persons or of property, nor transactions of sale and purchase, involving a delivery, can be forbidden, unless the person against whom the prohibition goes, violates some law enacted properly in exercise of the power to regulate. See *Northern Securities Co.* v. *United States*, 193 U. S. 197, 199; *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Adair* v. *United States*, 208 U. S. 161; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 236; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Ex parte Jackson*, 96 U. S. 727; *Chicago Ry. Co.* v. *Minnesota*, 134 U. S. 418, 455. Case of *Union Bridge Co.* v. *United States*, 204 U. S. 364, discussed and distinguished. The case of *New Haven Ry. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, is not an authority in

support of the contentions of the United States herein. The case is clearly distinguishable from the case at bar.

Foreign commerce is the intercourse between two countries, which, often, may be hostile. In determining the extent of, and limitations upon, foreign commerce, we have recourse to the law of nations. We find that one nation, for the protection of its citizens and its property, may put an embargo upon trade and fetter the intercourse. Were it otherwise, the nation itself might be destroyed, because of its inability to protect itself against the danger of unlimited intercourse. When, therefore, Congress regulates foreign commerce, it regulates something which has inherent limitations. The nation's protection may be involved in the exercise of a power, under certain circumstances, to bar all communication. There is no need, and no right, to forbid the citizens of one State from transferring their possessions and their persons to another.

The theory of the Government is, that Congress may destroy the existence of several branches of commerce, and regulate what remains.

Domestic commerce is very different in its nature, scope and extent. It is the intercourse between the citizens of the different States in the transportation of persons and property from one to the other. This intercourse between citizens of the different States is an intercourse of persons, all of whom are citizens of a Union, which was largely created in order to bring about unlimited intercourse, saving only to such extent as it should be found necessary to regulate the same.

It is a fundamental right of every owner of property in one State, to sell it to citizens of another State, and to have the same, when thus sold, transported. This right cannot be forbidden by Congress. However the intercourse may be regulated, such regulation must proceed upon the concession of the inability to deprive, altogether, of the right.

If Congress may forbid commerce between the States in the sense of transactions in trade in harmless articles, it may forbid intercourse between persons. It may forbid the carrier to

transport its shareholders or its directors, because it may be tempted to give them greater privileges in their carriage. *Buttfield* v. *Stranahan*, 192 U. S. 492; *Lawton* v. *Steele*, 152 U. S. 133; *Railroad Co.* v. *Richmond*, 19 Wall. 584.

The commodities clause is unconstitutional because it was intended to violate, and does actually violate, a right reserved to the States.

Any Federal statute which has for its purpose the destruction of title to property or of the enjoyment of property, title to which is vested by the law of the State in a third person, trenches upon the reserved right under the Tenth Amendment: *United States* v. *Fox*, 94 U. S. 315.

The commodities clause is unconstitutional because, in violation of constitutional restrictions upon the exercise of the right to regulate commerce, it deprives of liberty and property.

The power possessed by Congress to regulate commerce must be so exercised as not to destroy the right to dispose of property, or to make legal contracts concerning the use, or transportation, thereof.

To forbid a coal company to sell its coal to the citizens of another State, or to cause the same to be transported into such State, is to deprive it of its "liberty," because of the deprivation of the power to use its property, in accordance with its legal right. *McCray* v. *United States*, 195 U. S. 27; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 336; *Allgeyer* v. *Louisiana*, 165 U. S. 589.

The commodities clause is unconstitutional because it is in effect a taking of private property for public use without compensation.

An ownership of coal shares, involves the right to receive whatever benefit may result from the exercise of powers conferred by the law of the State which incorporated. Practically, to destroy the exercise of its franchises by the company, is to take its property as completely as though it was physically

seized. *Mugler* v. *Kansas*, 123 U. S. 623; *United States* v. *Lynah*, 188 U. S. 445.

Mr. William S. Opdyke, Mr. James M. Beck and *Mr. Walker D. Hines* filed a separate brief on behalf of the Delaware and Hudson Company. The first point of their brief relates only to the case of the Delaware and Hudson Company:

The Delaware and Hudson Company being organized primarily to produce and handle anthracite coal, and possessing its railroad powers merely as an incident to such primary purpose, is not embraced in the prohibition of the commodity clause. The Delaware and Hudson Company is a corporation whose railroad powers were granted as an incident to its industrial powers. It is a corporation organized to acquire land and mine therefrom anthracite coal and supply the same to consumers, and its railroad powers are incidental to that particular purpose. Clearly the term "railroad company" as used in the commodity clause does not apply to every corporation which operates a railroad. There are numerous industries throughout the country which operate, as incidental to their business, more or less railroad mileage. As to such mileage these corporations may be charged with the duties of a common carrier, and as business may be handled on through bills of lading such corporations would be, with respect to such matters, carriers subject to the act to regulate commerce. Yet such corporations could not, in any just sense, be regarded as railroad companies within the meaning of the commodity clause. In this class the Delaware and Hudson Company is included. The legislative history of this company shows that it is a coal company with incidental railroad functions. Unless, therefore, the expression "railroad company" in the commodity clause is to be taken as meaning every corporation of an industrial character which merely as an incident to its industrial functions operates a railroad, then the clause should not apply to this appellee. It is perfectly legitimate for an industrial corporation to promote the efficiency and economy

of its operations by the construction of railroads when legally empowered to do so. It would be a superlative injustice to treat an industrial corporation as a railroad company because of the operation of a railroad under such circumstances, and then, because the industrial corporation is so treated as a railroad company, to prohibit the industrial corporation from performing the very transportation functions which alone serve as the inducement to the operation of the railroad.

Another grave reason for not construing the clause to apply to this appellee is that such construction unnecessarily overturns a deliberate and long-settled policy jointly entered upon with respect to this appellee by the States of Pennsylvania and New York. The legislation of those two States with respect to this appellee shows a clear purpose to provide for the acquisition and mining of coal in Pennsylvania by a corporation formed for that purpose, and to provide further for the transportation of that coal to the State of New York by the same corporation. The commodity clause, if construed to apply to this company, does not merely impair, and to a large extent destroy, the rights of the individuals who have invested as bondholders and stockholders in the Delaware and Hudson, and the rights of individuals who may have contracted with that company, but the clause utterly nullifies the policy of the States of Pennsylvania and New York with reference to this corporation. An act of Congress ought not unnecessarily to be so construed as to nullify such a policy deliberately adopted and carried out by two States of the Union. The original legislation is now irrepealable by either of the two States.

To apply the commodity clause in this unnecessary manner to the Delaware and Hudson is to work a destruction of property rights of great magnitude, which have existed for nearly a century. To exclude appellee's coal from the only practical channel of interstate transportation is confiscatory, because largely destroying the value of appellee's coal and coal lands. To exclude the interstate coal traffic from appellee's railways

is confiscatory, because largely destroying the value of these railways and equipment. Such confiscation would be unconstitutional. However, even if such unconstitutionality were not clear, but were merely doubtful, it would be the duty of the court to avoid an unnecessary construction of the statute which would develop such constitutional doubts. *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407.

Mr. George F. Brownell and *Mr. Adelbert Moot* filed a separate brief on behalf of the Erie Railroad Company:

It is undisputed that the first predecessor of the Erie Railroad Company was organized in 1832, and that it is a stockholder in the Pennsylvania Coal Company which was authorized by a statute of Pennsylvania, in 1838, to transact the usual business of companies engaged in mining, transporting to market and selling coal, with power to purchase or lease coal lands, and to construct railroads, and that said coal company did acquire coal lands, develop mines, and enter into authorized contract relations with defendant's predecessors for the construction of railroads and the transportation of its coal to market.

The Hillside Coal & Iron Company was organized under a statute of Pennsylvania in 1869, with similar powers; and into this corporation many other coal corporations were afterwards merged, under the laws of Pennsylvania.

"Solely" to furnish an outlet, by authority of Pennsylvania and New York, this defendant's predecessors and said coal corporations, built railroads and mine branches in connection with said coal companies, to transport their coal to interstate markets; the railroads so built being duly authorized, and aggregating, in lines, branches, yards and sidings very expensive to build in the mountainous country in which they were built, about 190 miles.

These railroads will be "substantially valueless" if the defendant can no longer haul their tonnage to the usual interstate markets over its tracks, and the mines of these companies will be deprived of their only outlet to these markets, such

interstate markets being substantially their only markets for their output.

These railroad lines, branches, sidings, and yards, built "solely" for the accommodation of this coal business, have little business except such coal business, and that coal business is of such magnitude that it constitutes over 22% of the entire freight tonnage of all the railway lines of the Erie Railroad Company, and brings it over 20% of its revenue for transportation, and to deprive the defendant of such coal tonnage would greatly impair, and in many cases wholly destroy, both mines and railways.

The bondholders of this defendant and its predecessors hold bonds aggregating upwards of $136,000,000 that rest upon these properties, which will be greatly impaired or destroyed if the authorized contract and stockholding relations of railroads and mining corporations above described are destroyed, as they will be if the commodities clause is upheld, and it is held to also apply to this defendant as a mere stockholder.

This defendant is a minority stockholder in the Temple Iron Company, some of the coal of which also reaches interstate markets over defendant's lines, but defendant has nothing to do with mining coal, or dealing in it, and is in no way interested in coal mining except as "a stockholder" in the three coal mining corporations named.

Anthracite coal is harmless and necessary fuel, and the investigation of the Anthracite Strike Commission shows there is nothing unnatural about the present status of the business, in view of the natural difficulties encountered, the capital necessary to develop and carry it on, and the authority necessarily given capital by the State of Pennsylvania, to cause the formation of corporations to develop the expensive coal mines, and, therefore, the present status of the business furnishes no reason whatever for such legislation as the commodities clause.

The present status of timber lands and lumbering, as compared with coal properties and mining, furnishes no reason to

support the exemption of timber alone from the commodities clause.

The history of the commodities clause shows that it was enacted to prohibit mining according to the laws of that State, by corporations of Pennsylvania, by making it impossible for mining corporations of that State to sell in that State the coal mined, since the clause, if broadly construed, as the Government claims it should be, prohibits common carriers from carrying such coal to interstate markets upon any terms and conditions whatever, even for the lawful purchasers and consumers thereof.

The commodities clause not only vitally affects this defendant, and other railroad companies, if it is sustained as to stockholders, but it is vital to the interests of millions of citizens who are consumers of all necessary commodities, and also the stockholders and bondholders of all great industrial corporations, since they can no longer buy or sell the very necessaries of life without the consent of Congress.

That clause is unconstitutional because it is contrary to the fundamental and "unalienable" rights of citizens reserved to them by the Federal Constitution, by which they have the right to buy food, fuel, or other harmless necessaries of life, in any State they please, from anyone they choose, so long as their purchases are lawful in that State, although it is conceded the Federal Government can regulate, but not prohibit, the carriage of such necessaries to interstate markets.

Timber is a fuel, and Congress could not make a partial and unjust law discriminating between purchasers of timber fuel and purchasers of coal, or between stockholders and bondholders in common carriers owning timber lands and those owning coal lands, without violating the "due process of law" part of the Fifth Amendment, because there is no ground for exempting timber in the commodities clause, if it should apply to any fuel at all.

The only possible effect of the commodities clause upon coal is upon the mining or production thereof, if that clause is literally obeyed, hence it does not regulate interstate commerce,

it being a harmless and necessary commodity, but it undertakes to regulate its antecedent intrastate production, contrary to the Constitution and all such precedents.

MR. JUSTICE WHITE delivered the opinion of the court.

We dismiss for the present a contention made by one of the corporations that it is not a railroad company within the meaning of that term as used in the statute, which we shall have occasion to consider, because it is merely a coal company whose transporting operations are but incidental to its mining operations. With this contention put aside, it is true to say, speaking in a general sense, that the corporations, parties to this record, by means of railroads owned and operated by them, were engaged in transporting coal from the anthracite coal fields in Pennsylvania to points of market for ultimate delivery in other States. With much of the coal so transported the corporations had been or were connected by some relation distinct from the association which was necessarily engendered by the transportation of the commodity by the corporations as common carriers in interstate commerce. While the business of the corporations, generally speaking, had these characteristics, there were differences between them. Some of the corporations owned and worked mines and transported over their own rails in interstate commerce the coal so mined, either for their own account or for the account of those who had acquired title to the coal prior to the beginning of the transportation. Others, while operating railroads not only owned but also leased and operated coal mines, and carried the coal produced from such mines in the same way. Again, others of the railroad companies, although not operating mines, were the owners of stock in corporations engaged in mining coal, the coal so produced by such corporations being carried in interstate commerce by the railroad companies holding the stock in the producing coal companies, either for account of the producing corporations or for persons to whom the coal had been

sold at the point of production prior to the beginning of interstate commerce. This, moreover, was, additionally, the case as to some of the railroad companies who, as we have previously stated, were engaged both in the production of coal from mines owned by them and in interstate transportation of such product. All the attributes thus enjoyed by the corporations had been possessed by them for a long time and were expressly conferred by the laws of Pennsylvania, and, in some instances, also by the laws of other States, in which the companies likewise, in part, carried on their business. We insert in the margin a summary which the court below made concerning the situation of the respective corporations, taken from the answer or return made by each corporation.[1]

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[1] It is admitted, generally, by the defendants, that the allegations in the bills and petitions, as to their corporate existence, are true, and that they own or operate railroads engaged in the interstate transportation of coal from the anthracite region of Pennsylvania. They also admit that this transportation has been carried on by the several defendants long prior to the 8th day of May, 1906, and in the case of some of them, for a period varying from a quarter to more than half a century prior thereto. In addition to these general admissions, detailed statements are made by the defendants, respectively, of the character and extent of the ownership or other interests possessed by them in the coal so transported, or in the lands or mines from which it is produced. It is only necessary to briefly summarize these statements:

(1) The Delaware & Hudson Company alleges that it directly owns its coal lands as it does its railroad; that it was incorporated by an act of the legislature of the State of New York, April 23, 1823, and was "authorized to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson River in New York; to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market coal mined from such lands." That this authority was also expressly conferred by acts of the legislature of the State of Pennsylvania, between the years 1823 and 1871, and that these acts of the State of Pennsylvania resulted from the desire and policy of said State to create and foster the industry of mining such coal and developing the transportation thereof; that under the authority of these statutes of Pennsylvania and of New York, the said defendant, beginning as early as the year 1825, invested its capital

After the first day of May, 1908, the Government of the United States commenced these proceedings by bill in equity against each of the corporations, to enjoin each from carrying

in the purchase of a large quantity of coal lands in the State of Pennsylvania and in the construction of canal navigation in Pennsylvania from the Delaware River to the Hudson River; that later, under statutes of both States, it invested additional capital in the construction of railroads, in the State of Pennsylvania, and in the construction and acquisition of railroads and leasehold estates in the State of New York, for the same general purpose of transporting coal from the coal lands owned by it; that it has invested large sums of money, not only in the acquisition of coal property, but in the erection of structures for mining and terminal facilities; that some of its coal properties were acquired under leases upon royalties payable to the lessors for each ton of coal mined, the leases fixing large minimum amounts by way of rent; that large fixed rentals are required to be paid, not only for those mining lands but for railroads acquired for the purpose of transporting coal; that there are three coal companies whose shares are practically all owned by it, viz., The Northern Coal & Iron Company, The Jackson Coal Company, and The Hudson Coal Company; that its mining lands thus owned and acquired are located upon or contiguous to the railroads of defendant; that said railroads are the only reasonable, practical, and conveniently available avenues of transportation whereby the coal by it produced can be transported in interstate commerce, and the coal mined by the defendant and by said coal companies upon its lines of railroad amounts approximately to 70 per cent of the entire transportation by it, or to about 4,300,000 gross tons, its daily shipments averaging about 12 trains of 37 coal cars each; that the coal lands so acquired by the defendant and by said three coal companies would have little, if any, value, except for the mining of coal therefrom and its sale as a commercial commodity, and that if it is deprived, by virtue of the said act of Congress, of the right to transport said coal, it will be deprived of the only possible enjoyment of its property. It further avers that it is not a "railroad company" within the meaning of the act of Congress, but that it is a coal company, and that since the year 1870 it has become, incidentally to its business as a coal mining company, a common carrier by railroad of passengers and property.

It is further averred, as a special ground of defense by the said Delaware and Hudson Company, that this said "commodities clause" does not apply to it because all the coal mined by it upon its own lands, and upon the lands of the said three coal companies (except as to steam sizes,

in interstate commerce any coal produced under the circumstances which we have stated. At the same time a petition in mandamus was filed against each corporation, seeking to ac-

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as thereafter stated) "is sold, before transportation thereof begins, by said company to third persons at the mines in Pennsylvania from which such coal has been produced, and that said company does not, at the time when the same is so transported by it in interstate commerce, own the same nor any interest therein, direct or indirect, apart from its obligation and rights as a common carrier in the transportation thereof, and that it carries said coal for the account of the purchaser thereof, who is the consignor and owner of said coal.

(2) "The answer of the Erie Railroad Company states that it was originally organized under the laws of the State of New York in 1832; that it has been reorganized from time to time under mortgage foreclosure; and finally, in November, 1895, under a foreclosure sale, it was reorganized under the statutes of New York, whereby it "became the lawful owner of the property, rights, privileges, immunities and franchises of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by said predecessor companies, the railroads so owned by it and its said subsidiary companies having an aggregate mileage of over 2,100 miles in the States of New York, Pennsylvania, New Jersey, Ohio, Indiana and Illinois;" that the Pennsylvania Coal Company was created a corporation by the laws of Pennsylvania in 1838, its charter giving it the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mined;" and for that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to construct railroads with one or more tracks. In 1853 the said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York & Erie Railroad. The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was continued by acts of the legislature of Pennsylvania in 1857, 1864, 1867 and 1868; that in pursuance of these various acts of the legislature, the Pennsylvania Coal Company obtained capital, issued stock therefor, acquired coal lands, developed coal mines, produced, transported to markets, and sold coal; built and operated railroads, made railway connections as authorized, and did other like acts to promote the business of supplying all persons needing the same with anthracite coal. The Hillside Coal & Iron Company was organized by an act of the legislature of the State of Pennsylvania in 1869 for the purposes and with powers similar to those

complish the same result. Both the equity causes and the mandamus proceedings were based upon the assumption that the first section of the act to regulate commerce, as amended

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of the Pennsylvania Coal Company. Under authority of acts of the legislature of Pennsylvania the said Erie Railroad Company, long prior to the passage of said amendment to the interstate commerce act, acquired substantially all the capital stock of said Pennsylvania Coal Company, the Hillside Coal & Iron Company, the Jefferson Railroad Company, and Erie & Wyoming Railroad Company, and a small minority of the stock of the Temple Iron Company; and has pledged the same under various mortgages, pursuant to which have been issued and are now outstanding bonds for large sums, aggregating many millions of dollars, which bonds are held by purchasers in good faith and for value throughout the world; that for many years prior to May 1, 1908, it has been engaged in transporting the coal of said corporations to markets outside the State of Pennsylvania, many of which can only be reached from the railroad lines of this defendant; that the coal so transported amounts annually to several millions of tons and constitutes 22 per cent of the entire freight tonnage of this defendant, the Erie Company. It also denies that it is, by reason of the ownership of said stock in said companies, the owner in whole or in part, of the coal transported by it in interstate commerce, or that it has or had any interest, direct or indirect therein, and therefore has not violated or failed to comply with the so-called "commodities clause" of the interstate commerce act.

(3) The Central Railroad Company of New Jersey avers that it was organized under the laws of the State of New Jersey, and by these laws was authorized to purchase and hold the stock or securities of any other corporation, of New Jersey or elsewhere, and that it was also so authorized by two acts of assembly of the State of Pennsylvania, one of which, approved April 15th, 1869, was entitled "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber and other material interests of this Commonwealth;" that pursuant to the authority of these several acts, it had, long prior to the said act of Congress, become the owner of a majority of the shares of the capital stock of the Honeybrook Coal Company and of the Wilkesbarre Coal & Iron Company, both companies now being merged into the Lehigh & Wilkesbarre Company, a large majority of whose shares are owned by it; that it also owns a minority of the shares of the Temple Iron Company; that in 1871 it became the lessee of the Lehigh & Susquehanna Railroad, a Pennsylvania corporation, which it has ever since operated under an obligation to pay a yearly rental of not less than $1,414,400, and not

and reënacted by the law usually referred to as the Hepburn Act, approved June 29, 1906, c. 3591, 34 Stat. 584, contained a provision, generally known as the commodities clause, which

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to exceed $2,043,300 per annum; that its gross earnings from the transportation of coal amounted, for the year ending June 7th, 1907, to $9,312,268.04, being 48 per cent of its entire freight receipts; and that a large part of its earnings from freight and miscellaneous passenger traffic is incident to and dependent upon the operation of the mines and collieries of said coal companies; and that the greater part of its earnings from transportation of coal comes from its carriage of the coal mined by the Lehigh & Wilkesbarre Coal Company; and that large sums of money have been expended by it in extending its lines and in constructions to enable it to transport said coal in interstate commerce.

(4) The Delaware, Lackawanna & Western Railroad Company, like the Delaware & Hudson Company, admits that it is the owner of coal lands and mines coal which it sells; that it was organized under an act of the legislature of Pennsylvania in 1849; that all the lines of railroad owned by it are wholly within the State of Pennsylvania, extending from the Delaware River, at the boundary line of the State of New Jersey, in a northwesterly direction across the State of Pennsylvania to the boundary line between the State of Pennsylvania and the State of New York, with a branch line extending from Scranton, in the State of Pennsylvania, to Northumberland, in said State. Said defendant also admits and alleges that, under express authority of acts of the legislature of the States of Pennsylvania, New Jersey, and New York, it, as lessee, now operates, and long prior to May 1st, 1908, has operated, various lines of railroad in the two last-mentioned States, by which it has direct traffic connection with the city of Buffalo and other cities in the said States. Defendant also admits that for many years it has owned in fee, extensive tracts of coal land in the State of Pennsylvania; that it has also leased large tracts of coal land in the said State, and is now engaged, and for many years last past has been engaged, in mining coal from the lands so owned and leased by it; that the holding of said lands, whether in fee or by lease, and the mining, manufacture, and interstate transportation of the coal therefrom, has been and continues to be, under and by virtue of the authority of the laws of the State of Pennsylvania.

That in addition to the foregoing, certain coal companies, organized from time to time under acts of assembly of the said State of Pennsylvania, have been merged into said defendant corporation; that by an act of the general assembly of the State of Pennsylvania, approved April 15th, 1869, entitled "An act to authorize railroad and canal companies

caused it to be illegal for the corporations after May 1, 1908, to transport in interstate commerce coal with which the railroad companies were or had been connected or associated in any of

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to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth," the defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material interests of Pennsylvania, by the purchase of their capital stock or bonds, or either of them. The answer of said defendant also alleges that, by reason of its ownership of said coal lands and coal, and the revenues derived from the transportation of the same to market, it has been enabled to expend millions in the betterment of its general transportation facilities for both goods and passengers, and give to the public the benefits of a well constructed and equipped modern railroad.

That by virtue of leases of railroads, to enable it to transport coal in interstate commerce, it has become bound to pay yearly, in interest charges, the sum of $5,155,697, and for taxes $1,163,916. That out of a total of about 8,700,000 tons of coal produced by it in the year 1907 from its lands owned in fee and leased, upwards of 6,700,000 tons were transported over its lines of railroad in interstate commerce; that from 40 per cent to 60 per cent of its annual transportation earnings, from the operation of leased lines, has been derived from the carriage of its own coal thereover.

That it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal, of pea size or smaller, annually, and will require more for such use in the future; that to obtain this coal in these economic sizes it is necessary to break up coal, leaving the larger sizes, which must be disposed of otherwise; that great waste would result if it were forbidden to transport to market in interstate commerce these larger sizes thus resulting.

That defendant's rights to acquire its holding of coal land, its rights to own and mine coal and to transport the same to market in other States as well as in Pennsylvania, and its leases of other railroads, were acquired many years prior to the enactment of the so-called "Interstate Commerce Act," and of the said amendment thereto known as the "commodities clause."

(5) The answer of the Pennsylvania Railroad Company avers that it was incorporated under the laws of the State of Pennsylvania April 13th, 1846; that as early as 1871, under authority of two general statutes of the State of Pennsylvania, it became the owner of all the shares of the Susquehanna Coal Company, of all the shares of the Summit Branch Mining Company, and of one-third of the shares of the Mineral Railroad

the modes above stated. Except as we have said, in the particular that one of the corporations claimed that it was not a railroad company within the meaning of the commodities

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Mining Company, corporations of the State of Pennsylvania; that since the last-mentioned year, and up to the present time, it has carried the coal produced from the mines of the said coal companies, at lawfully established schedule rates, over its lines of railroad; that approximately 65 per cent of the coal so mined has been carried to destinations outside the State of Pennsylvania; that it mines no coal, but that the coal it carries is mined by the said coal companies, and that it has no interest therein within the meaning of the said act of Congress, either direct or indirect; that the most largely producing of the properties belonging to these coal companies are located either directly upon, or so contiguous to the system of railroads operated by said defendant, as to render transportation by any other railroads not reasonably practicable.

(6) The answer of the Lehigh Valley Railroad Company states that it was originally incorporated September 20th, 1847, under the laws of the State of Pennsylvania. Under the authority of various acts of assembly of the said State, other railroad and coal companies, prior to the year 1874, have been merged into it, some of which railroads were expressly authorized to construct railroads and to carry on the business of mining, transporting, and vending coal. It is also the lessee of railroads in Pennsylvania; that by means of its own and of said leased lines of railroad it conducts, and for many years has conducted, an interstate transportation of coal; that since 1872, pursuant to authority conferred by the laws of Pennsylvania, it has also owned the majority of the capital stock of the New York and Middle Coal Field Railroad and Coal Company, a corporation of the State of Pennsylvania; also the entire capital stock of Coxe Bros. & Company, a corporation of said State; a minority interest in the capital stock of the Highland Coal Company; a majority of the stock of the Locust Mountain Coal & Iron Company; a minority interest in the capital stock of the Packer Coal Company and of the Temple Iron Company, all corporations of the State of Pennsylvania, organized for the purpose of mining coal, some of them more than a half century ago; that it has constructed lines of railroad and branch railroads and terminal facilities for the purpose of transporting to market, in interstate commerce, the coal of the companies whose shares it owns, and this business has been conducted by it for many years; that practically said coal can be transported to market only by its railroads; that the capital stock of two of the coal companies owned by said defendant has been transferred to a trustee, to hold under a general mortgage executed by defend-

clause, they all defended substantially upon the ground that when correctly interpreted the commodities clause did not forbid the interstate commerce traffic in coal by them carried on. If it did, the clause was assailed as inherently repugnant to the Constitution, because the right to enact it was not embraced within the authority conferred upon Congress to regulate commerce. In addition it was contended that even if, abstractly considered, the clause might be embraced within the grant of power to regulate commerce, nevertheless its provisions were in conflict with the due process clause of the Fifth Amendment to the Constitution, because of the destructive effect which the enforcement of its provisions would produce on the rights of property which the corporations possessed and had long enjoyed under the sanction of valid state laws. It was besides insisted that in any event the clause was repugnant to the Constitution, because of the discrimination caused by the exception as to timber and the manufactured products thereof. The cases were submitted on the pleadings, and were heard and decided at one and the same time. Treating the clause as having the meaning which the Government contended for, the court came to consider the alleged repugnancy of the enactment to the Constitution. In the principal opinion the subject

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ant, under which mortgage bonds to the amount of $23,539,000 have been issued by said defendant and are now outstanding in the hands of the public; that the capital stock of Coxe Bros. & Company, Inc., owned by this defendant as aforesaid, has been transferred and assigned to, and is now held by, a trustee under a collateral trust agreement executed by said defendant, dated November 1st, 1905, for the purpose and upon the terms expressed in said agreement, a copy of which is annexed to said answer, and that bonds to the amount of $18,000,000 have been issued under said agreement and are now outstanding in the hands of the public; that said defendant transports annually, in interstate commerce, upwards of 7,600,000 tons of anthracite coal, shipped by the said coal companies whose stock is owned by said defendant, in whole or in part as aforesaid, and transports annually for said coal companies, wholly within the State of Pennsylvania, upwards of 1,500,000 tons; that nearly 42 per cent of its gross annual earnings of $36,068,431 for the last fiscal

was at least formally approached, not for the purpose of deciding whether inherently the commodities clause was within the competency of Congress to enact as a regulation of commerce, but whether the provisions of that clause were repugnant to the Constitution because of the destructive effect of its prohibitions upon the vast sum of property rights which the corporations were found to enjoy as a result of valid state laws. In this aspect the issue which the court deemed it was called upon to determine was thus by it epitomized:

"The fundamental and underlying question, however, which presents itself at the threshold of all the cases for our consideration is whether the so-called commodities clause amendatory to the act to regulate commerce, passed June 29, 1906, so far as its scope applies by the universality of its language to the cases here presented, is in excess of the legislative authority granted to Congress by the Constitution. This question must be considered with reference to the Constitution as a whole and in relation to the agreed facts of the several cases. It is therefore necessary to keep in mind the situation as presented by these defendants, the facts set forth in their individual answers as above briefly summarized and the relevant industrial condi-

year, or $15,010,899, were derived from coal freights, which represented over 51 per cent of its entire freight tonnage; that the greater part of its gross earnings from coal transportation was received from the coal companies whose shares are by it owned; that the mines and collieries of said coal companies are all so located in the portions of the coal fields tributary to its lines of railroad that no means of transporting their product can be made available, except by defendant's railroads; that the railroad lines of this defendant have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at enormous expense, in reliance upon the rights and franchises conferred by the statutes of Pennsylvania aforesaid; that a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and collieries of said coal companies, and that if said defendant were deprived of the earnings derived from the transportation of the coal of said coal companies its business could not be continued, except at a net loss of many millions of dollars per annum.

tions which being matters of common knowledge may be judicially noticed."

The situation which it was considered should be kept in mind for the purpose of passing upon the constitutional question was thus stated:

"The general situation is that for half a century or more it has been the policy of the State of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to market in Pennsylvania and other States. Two of the defendant corporations, as appears from their answers, were created by the legislature of Pennsylvania, one of them three-quarters of a century ago and the other half a century ago, for the expressed purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and of other States. It is not questioned that pursuant to this general policy investments were made by all the defendant companies in coal lands and mines and in the stock of coal-producing companies, and that coal production was enormously increased and its economies promoted by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different States of the Union and Canada for the year 1905 (the last year for which there is authoritative statistics) was 61,410,201 tons; that approximately four-fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads, from Pennsylvania to markets in other States and Canada, and of this four-fifths, from 70 to 75 per cent, was produced either directly by the defendant companies or through the agency of their subsidiary coal companies.

"It also appears from the answers filed that enormous sums of money have been expended by these defendants to enable them to mine and prepare their coal and to transport it to any

point where there may be a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the constitution and laws of the State of Pennsylvania, and that their right to enjoyment of the same has never been doubted or questioned by the courts or people of that Commonwealth, but has been fully recognized and protected by both."

It was decided that, as applied to the defendants, the commodities clause was not within the power of Congress to enact as a regulation of commerce. 164 Fed. Rep. 215. A member of the court dissented and expressed his reasons in a written opinion. Without adverting to all the reasoning expounded in that opinion, we think it accurate to say that in a large and ultimate sense it proceeded upon the assumption that, as the commodities clause provided, to quote the summing up of the opinion, for "the divorce of the dual relation of public carrier and private transporter," it was a regulation of commerce, and as such was within the power of Congress to enact, and when enacted was operative upon the defendants, and therefore required them to conform to the regulation, even although to do so might in some way indirectly affect valid rights derived from prior state legislation.

Judgments and decrees were entered denying the applications for mandamus and dismissing the bills of complaint.

The text of the commodities clause upon which the cases depend is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in

whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The Government insists that this provision prohibits railroad companies from transporting in interstate commerce articles or commodities other than the excepted class, which have been manufactured, mined or produced by them or under their authority, or which they own or may have owned in whole or in part, or in which they have or may have had any interest, direct or indirect. These prohibitions, it is further insisted, apply to the transportation by a railroad company in interstate commerce of a commodity which has been manufactured, mined or produced by a corporation, in which the transporting railroad company is a stockholder, irrespective of the extent of such stock ownership. This construction of the provision rests not only upon the meaning which the Government insists should be given to its text, but on the significance of the text as illumined by what it is insisted was the result intended to be accomplished by the enactment of the clause. The purpose, it is contended, was not merely to compel railroad companies to dissociate themselves before transportation from articles or commodities manufactured, mined, produced or owned by them, etc., but moreover to divorce the business of transporting commodities in interstate commerce from their manufacture, mining, production, ownership, etc., and thus to avoid the tendency to discrimination, forbidden by the act to regulate commerce, which, it is insisted, necessarily inheres in the carrying on by a railroad company of the business of manufacturing, mining, producing or owning, in whole or in part, etc., commodities which are by it transported in interstate commerce.

The construction relied on is thus summed up in the argument of the Government: "It (the clause) forbids the carrier, who owns the mines and sells coal, to transport that coal in interstate commerce. . . . This is not trifling with the question. It states the exact fact and the reality." And, in

accordance with this principle, the insistence in argument is that it was the duty of the carrier who owned and worked coal mines, or who had stock in such mines, or who owned coal, in order to bring themselves within the law, to dispose absolutely of all their interest in coal-producing property, in whatever form enjoyed, and to cease absolutely from acquiring like rights in the future. It was, doubtless, because of the far-reaching effect of this construction upon the enormous property interests involved which caused the result of the provision to be thus stated in the argument for the Government: "This is undoubtedly a searching and radical law, and was meant to be so." True, the Government, in argument, suggests that the radical result of the statute may be assuaged, without violating its spirit, by limiting its prohibitions so as to cause them to apply only so long as the commodities to which it applies are in the hands of a carrier or its first vendee. But no such limitation is expressed in the statute, and to engraft it would be an act of pure judicial legislation. Besides, to do so would be repugnant to the asserted spirit and purpose of the statute which lies at the foundation of the construction upon which the Government relies.

Let us as a prelude to an analysis of the clause, for the purpose of fixing its true construction and determining the constitutional power to enact it when its significance shall have been rightly defined, point out the questions of constitutional power which will require to be decided if the construction relied upon by the Government is a correct one.

We at once summarily dismiss all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause, if it be susceptible of the construction which the Government has placed upon it. We do this because obviously mere suggestions of inconvenience or harm are wholly irrelevant, as they cannot be allowed to influence us in determining the question of the constitutional power of Congress to enact the clause.

Let it be conceded at once that the power to regulate com-

merce possessed by Congress is in the nature of things ever enduring, and therefore the right to exert it to-day, to-morrow and at all times in its plenitude must remain free from restrictions and limitations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate. For our present purposes, moreover, although we may have occasion to examine the subject hereafter, we entirely put out of view all the contentions based upon the assumption that even, although the provisions of the clause be in and of themselves lawful regulations of commerce, if prospectively applied, nevertheless they cannot be so considered, because of their retroactive effect upon the rights of the defendants alleged to have been secured by valid state laws. We further concede for the purpose of the inquiry we are at present making, although we may also have occasion to examine the subject hereafter, that the power of Congress to regulate commerce can be constitutionally so exerted as to compel a railroad company engaged in interstate commerce to dissociate itself in interest from the commodities which it transports in interstate commerce, even although by existing state laws the railroad company may have a lawful right of ownership or association with the commodity upon which the regulation operates.

With these concessions in mind, and despite their far-reaching effect, if the contentions of the Government as to the meaning of the commodities clause be well founded, at least a majority of the court are of the opinion that we may not avoid determining the following grave constitutional questions: 1. Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce. 2. If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in

interstate commerce from carrying lawful articles or commodities because, at some time prior to the transportation, it had manufactured, mined, produced or owned them, etc.? And involved in the determination of the foregoing questions we shall necessarily be called upon to decide, (*a*) Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the States of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities, a power which the States from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several States have been developed, their enterprises fostered, and vast investments of capital have been made possible? (*b*) Although the Government of the United States, both within its spheres of national and local legislative power, has in the past for public purposes, either expressly or impliedly, authorized the manufacture, mining, production and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?

While the grave questions thus stated must necessarily, as we have said, arise for decision, if the contention of the Government, as to the meaning of the commodities clause be correct, we do not intend, by stating them, to decide them, or even in the slightest degree to presently intimate, in any respect whatever, an opinion upon them. It will be time enough to approach their consideration if we are compelled to do so hereafter, as the result of the further analysis, which we propose to make in order to ascertain the meaning of the commodities clause.

It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.

Knights Templars Indemnity Co. v. *Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* v. *Interstate Com. Comm.*, 211 U. S. 407.

Recurring to the text of the commodities clause, it is apparent that it disjunctively applies four generic prohibitions, that is, it forbids a railroad carrier from transporting in interstate commerce articles or commodities, 1, which it has manufactured, mined or produced; 2, which have been so mined, manufactured or produced under its authority; 3, which it owns in whole or in part, and, 4, in which it has an interest, direct or indirect.

It is clear that the two prohibitions which relate to manufacturing, mining, etc., and the ownership resulting therefrom, are, if literally construed, not confined to the time when a carrier transports the commodities with which the prohibitions are concerned, and hence the prohibitions attach and operate upon the right to transport the commodity because of the antecedent acts of manufacture, mining or production. Certain also is it that the two prohibitions concerning ownership, in whole or in part, and interest, direct or indirect, speak in the present and not in the past; that is, they refer to the time of the transportation of the commodities. These last prohibitions, therefore, differing from the first two, do not control the commodities if at the time of the transportation they are not owned in whole or in part by the transporting carrier, or if it then has no interest, direct or indirect, in them. From this it follows that the construction which the Government places upon the clause as a whole is in direct conflict with the literal meaning

of the prohibitions as to ownership and interest, direct or indirect. If the first two classes of prohibitions as to manufacturing, mining or production be given their literal meaning, and therefore be held to prohibit, irrespective of the relation of the carrier to the commodity at the time of transportation, and a literal interpretation be applied to the remaining prohibitions as to ownership and interest, thus causing them only to apply if such ownership and interest exist at the time of transportation, the result would be to give to the statute a self-annihilative meaning. This is the case since in practical execution it would come to pass that where a carrier had manufactured, mined and produced commodities, and had sold them in good faith, it could not transport them; but, on the other hand, if the carrier had owned commodities and sold them it could carry them without violating the law. The consequence, therefore, would be that the statute, because of an immaterial distinction between the sources from which ownership arose, would prohibit transportation in one case and would permit it in another like case. An illustration will make this deduction quite clear: A carrier mines and produces and owns coal as a result thereof. It sells the coal to A. The carrier is impotent to move it for account of A in interstate commerce because of the prohibition of the statute. The same carrier at the same time becomes a dealer in coal and buys and sells the coal thus bought to the same person, A. This coal the carrier would be competent to carry in interstate commerce. And this illustration not only serves to show the incongruity and conflict which would result from the statute if the rule of literal interpretation be applied to all its provisions, but also serves to point out that as thus construed it would lead to the conclusion that it was the intention, in the enactment of the statute, to prohibit manufacturing and production by a carrier and at the same time to offer an incentive to a carrier to become the buyer and seller of commodities which it transported.

But it is said, on behalf of the Government, in view of the purpose of Congress to prohibit railroad companies engaged in

interstate commerce from being at the same time manufacturers, producers, owners, etc., of commodities which they carry, despite the literal sense of some of the prohibitions they should all be construed so as to accomplish the result intended, and, therefore, their apparent divergence and conflict should be removed by construing them all as prohibiting the transportation because of the causes stated, irrespective of the particular relation of the railroad company to the commodities at the time of transportation. This suggestion, however, simply invites us, under the assumption that Congress had a particular intention in enacting the clause, to so construe the clause as to cause it to be essential to decide the grave constitutional questions which we have hitherto pointed out. On the contrary, as the prohibitions concerning ownership in whole or in part, and interest, direct or indirect, are susceptible only of the construction that the dissociation of the carrier with the products which it transports was contemplated, our duty is, if possible, to treat the other and apparently conflicting prohibitions as embracing a like purpose, and thus harmonize the provisions of the clause and prevent the necessity of approaching and passing upon the grave constitutional questions which would necessarily arise from pursuing the contrary course. This, it is urged, cannot be done, since to do so would be in effect to expunge the prohibitions against manufacturing, mining and production from the clause, as ownership in whole or in part or interest, direct or indirect, would embrace everything which could possibly have been intended to be expressed by the terms manufacturing, mining and production if the proposed reconciliation of the conflict between the prohibitions be brought about. We think, however, that a brief reference to a ruling of this court concerning the effect of the Interstate Commerce Law, prior to its amendment by the Hepburn Act, will serve to make clear the unsoundness of the proposition. The case referred to is that of the *New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361. In that case, after much consideration, it was held that the prohibitions of the Interstate Commerce

Act as to uniformity of rates and against rebates operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible. In thus deciding, however, it became necessary (pp. 399, 400) to refer to rulings of the Interstate Commerce Commission construing the act to regulate commerce, made not long after the enactment of the statute, in which it was held that where interstate commerce carriers were engaged in manufacturing, mining, producing and carrying commodities in virtue of state charters authorizing them so to do, granted prior to the enactment of the act to regulate commerce, that act could not be applied without confiscation, except in so far as the requirement of reasonableness of rates was concerned. While referring to those administrative rulings, and declaring that in view of their long standing the construction which had been thus given to the act should not be departed from, "at least until Congress has legislated on the subject" (p. 401), it was nevertheless plainly intimated that legislation which compelled a carrier, even although authorized by its charter before the passage of the act to regulate commerce to engage in the production as well as transportation of commodities, to dissociate itself before transportation from the products which it manufactured, mined or produced, would not, when enforced by proper rules and regulations, amount to confiscation. When, therefore, the subject of ownership, in whole or in part, or the interest of a carrier, direct or indirect, in the product which it transported, came to be considered, and the duty to dissociate before transportation came to be legislatively imposed, it is quite natural, in view of the prior administrative rulings and the intimations of this court, conveyed in the opinion in the *New Haven case*, to assume that the provisions as to manufacturing, mining and production, while they may be somewhat redundant, were nevertheless expressed

for the purpose of leaving no possible room for the implication that it was not the intention to include ownership resulting from manufacture, mining, production, etc., even although the right to manufacture, mine and produce was sanctioned by state charters prior to the enactment of the act to regulate commerce. Looking at the statute from another point of view the same result is compelled. Certain it is that we could not construe the statute literally without bringing about the irreconcilable conflict between its provisions which we had previously pointed out, and therefore some rule of construction is essential to be adopted in order that the statute may have a harmonious operation. Under these circumstances, in view of the far-reaching effect to arise from giving to the first two prohibitions a meaning wholly antagonistic to the remaining ones, we think our duty requires that we should treat the prohibitions as having a common purpose, that is, the dissociation of railroad companies prior to transportation from articles or commodities, whether the association resulted from manufacture, mining, production or ownership, or interest, direct or indirect. In other words, in view of the ambiguity and confusion in the statute we think the duty of interpreting should not be so exerted as to cause one portion of the statute which, as conceded by the Government, is radical and far-reaching in its operation if literally construed, to extend and enlarge another portion of the statute which seems reasonable and free from doubt if also literally interpreted. Rather it seems to us our duty is to restrain the wider, and as we think, doubtful prohibitions so as to make them accord with the narrow and more reasonable provisions, and thus harmonize the statute.

Nor is there force in the contention that because the going into effect of the clause was postponed for a period of nearly two years, therefore the far-reaching and radical effects which the Government attributes to the clause must have been contemplated by Congress. We think, on the contrary, it is reasonable to infer, in view of the facts disclosed in the statement which we have previously excerpted, that the delay accorded

is entirely consistent with the assumption that it was so granted to afford the time essential to make the changes which would be required to conform to the commands of the clause as we have interpreted it, such as providing the facilities for dissociation by sale at the point of production before transportation or segregation by means of the organization of *bona fide* manufacturing, mining or producing corporations.

It remains to determine the nature and character of the interest embraced in the words "in which it is interested directly or indirectly." The contention of the Government that the clause forbids a railroad company to transport any commodity manufactured, mined or produced, or owned in whole or in part, etc., by a *bona fide* corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer they cannot be held to include commodities manufactured, mined, produced or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. *Pullman Palace Car Co.* v. *Missouri Pacific R. R.*, 115 U. S. 587; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the Government that if the clause embraces only a legal interest in an article or commodity it cannot be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined or produced, or is owned by a corporation in

which the carrier is a stockholder. The contention of the Government substantially rests upon the assumption that unless the words be given the meaning contended for they are without significance. That this is clearly not the case is well illustrated by the *New Haven case, supra.* In that case the Chesapeake and Ohio Railway Company it was shown at one time not only directly engaged in buying, selling and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to. Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 1906, 40 Cong. Rec. pt. 7, pp. 7012–7014. And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the

statement taken from the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the Government not well founded.

We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part; (*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder.

The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think is apparent, and if reference to authority to so demonstrate is necessary it is afforded by a consideration of the ruling in the *New Haven case*, to which we have previously referred. We do not say this upon the assumption that by the grant of power to regulate commerce the authority of the Government of the United States has been unduly limited on the one hand and inordinately extended on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the States of lawful commodities or to destroy the governmental power of the States as to subjects within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations en-

tirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all preëxisting rights of the railroad companies were subordinated. *Armour Packing Co.* v. *United States*, 209 U. S. 56.

We think it unnecessary to consider at length the contentions based upon the due process clause of the Fifth Amendment. In form of statement those contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause interpreted as the Government construed it. For the purpose of our consideration of the subject it may be conceded, as insisted on behalf of the United States, that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation. When, however, mere forms of statement are put aside and the real scope of the argument at bar is grasped, we think it becomes clear that in substance and effect the argument really asserts that the clause as construed by the Government is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibitions, which, it is insisted, could not be exerted in virtue of the authority to regulate. The whole support upon which the propositions and the arguments rest hence disappear as a result of the construction which we have given the statute. Through abundance of caution we repeat that our ruling here made is confined to the question before us. Because, therefore, in pointing out and applying to the statute the true rule of construction, we have indicated the grave constitutional questions which would be presented if we departed from that rule, we must not be considered as having decided those questions. We have not entered into their consideration, as it was unnecessary for us to do so.

Without elaborating, we hold the contention that the clause

under consideration is void because of the exception as to timber, and the manufactured products thereof, is without merit. Deciding, as we do, that the clause, as construed, was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation when adopted should be applied to all commodities alike. It follows that even if we gave heed to the many reasons of expedience which have been suggested in argument against the exception and the injustice and favoritism which it is asserted will be operated thereby, that fact can have no weight in passing upon the question of power. And the same reasons also dispose of the contention that the clause is void as a discrimination between carriers.

With reference to the contention that the commodities clause is void because of the nature and character of the penalties which it imposes for violations of its provisions, within the ruling in *Ex parte Young*, 209 U. S. 123, we think it also suffices to say that even if the delay which the clause provided should elapse between its enactment and the going into effect of the same does not absolutely exclude the clause from the ruling in *Ex parte Young*, a question which we do not feel called upon to decide, nevertheless the proposition is without merit, because, (*a*) no penalties are sought to be recovered in these cases, and, (*b*) the question of the constitutionality of the clause relating to penalties is wholly separable from the remainder of the clause, and, therefore, may be left to be determined should an effort to enforce such penalties be made.

There is a contention as to one of the defendants, the Delaware and Hudson Company, to which we, at the outset, referred, which requires to be particularly noticed. Under the charters granted to the company by the States of New York and Pennsylvania it was authorized to secure coal lands and mine coal, and, without going into detail, was originally authorized to construct a canal, and, ultimately, a railroad for the purpose of transporting, for its own account, the products of its mines, and, undoubtedly, vast sums of money have been in-

vested in carrying out these purposes. It is true also that the company is the owner of stock in various coal corporations. The claim now to be disposed of is that by the true construction of its charters the Delaware and Hudson Company is not a railroad company within the meaning of the term as used in the commodities clause, but is really a coal company. The contention, we think, is without merit. The facts stated in the excerpts from the answer and returns of the company, which we have previously placed in the margin, leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, and as such we think it was a railroad company within the purview of the clause and subject to the regulations which are embodied therein as we have interpreted them.

As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants, concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it.

And it is so ordered.

MR. JUSTICE HARLAN, dissenting.

As these cases have been determined wholly on the construction of those parts of the Hepburn Act which are here in ques-

tion, and as Congress, if it sees fit, may meet that construction by additional legislation, I deem it unnecessary to enter upon an extended discussion of the various questions arising upon the record, and will content myself simply with an expression of my non-concurrence in the view taken by the court as to the meaning and scope of certain provisions of the act. In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the company which mined, manufactured or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the purpose which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal.